EB-2017-0335

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B;

AND IN THE MATTER OF an application by Hydro One Networks Inc. for electricity transmission revenue requirement and related changes to the Uniform Transmission Rates beginning January 1, 2017 and January 1, 2018;

AND IN THE MATTER OF the Decision of the Ontario Energy Board on the Application dated September 28, 2017;

AND IN THE MATTER OF Rules 40, 42 and 43 of the *Rules of Practice and Procedure* of the Ontario Energy Board.

BOOK OF AUTHORITIES OF THE MOVING PARTY, ANWAATIN INC.
(motion for review and variance)

January 15, 2018

Lisa (Elisabeth) DeMarco
DeMarco Allan LLP
200-5 Hazelton Avenue
Toronto, ON M5R 2E1
Tel: 647-991-1190
Fax: 1-888-734-9459
E-mail: lisa@demarcoallan.com

Cary Ferguson
DeMarco Allan LLP
200-5 Hazelton Avenue
Toronto, ON M5R 2E1
Tel: 647-983-2084
Fax: 1-888-734-9459
E-mail: cary@demarcoallan.com

Counsel to Anwaatin Inc.

TO: Ontario Energy Board
2700-2300 Yonge Street
Toronto, ON M4P 1E4

Tel: 416-481-1967
Fax: 416-440-7656

AND TO: Intervenors of Record

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David Dunsmuir (Appellant) v. Her Majesty the Queen in Right of the Province of New Brunswick as represented by Board of Management (Respondent)

McLachlin C.J.C., Bastarache, Binnie, LeBel,
Deschamps, Fish, Abella, Charron, Rothstein JJ.

Heard: May 15, 2007
Judgment: March 7, 2008 *
Docket: 31459

Proceedings: affirming *New Brunswick (Board of Management) v. Dunsmuir* (2006), 2006 CarswellNB 155, 2006 CarswellNB 156, 2006 NBCA 27, (sub nom. *Dunsmuir v. R.*) 2006 C.L.L.C. 220-030, 297 N.B.R. (2d) 151, 771 A.P.R. 151, 44 Admin. L.R. (4th) 92, 48 C.C.E.L. (3d) 196, 265 D.L.R. (4th) 609 (N.B. C.A.)**Proceedings: affirming *New Brunswick (Board of Management) v. Dunsmuir* (2005), 2005 NBQB 270, 2005 CarswellNB 444, 293 N.B.R. (2d) 5, 762 A.P.R. 5, 43 C.C.E.L. (3d) 205 (N.B. Q.B.)**

Counsel: J. Gordon Petrie, Q.C., Clarence L. Bennett for Appellant
C. Clyde Spinney, Q.C., Keith P. Mullin for Respondent

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Labour and employment law --- Employment law — Termination and dismissal — Termination of employment by employer — Procedure on dismissal — Procedural fairness

Employee was employed by Province as legal officer and court clerk — Performance issues arose and employee was disciplined — Province later dismissed employee with four months' notice, and did not allege cause for dismissal — Employee grieved under Public Service Labour Relations Act ("PSLRA"), alleging that dismissal was actually for cause and he was not given opportunity to correct his performance prior to dismissal — After interpreting sections of PSLRA and Civil Service Act ("CSA"), adjudicator determined he had jurisdiction to inquire into reasons for employee's dismissal — Adjudicator held that employee was denied procedural fairness and reinstated him — Province applied successfully for judicial review — Application judge held that adjudicator was incorrect in finding that he had jurisdiction to inquire into true reasons for dismissal, and that adjudicator erred in ruling that employee had been denied procedural fairness — Employee unsuccessfully appealed to Court of Appeal — Employee appealed to Supreme Court of Canada — Appeal dismissed —

Adjudicator's decision was correctly struck down on judicial review — Adjudicator erred in his application of duty of fairness by imposing procedural fairness requirements on Province over and above its contractual obligations and ordering reinstatement — Employee was contractual employee of Province as well as public office holder — Section 20 of CSA provided that, as civil servant, employee could only be dismissed in accordance with ordinary rules of contract — It was unnecessary to consider public law duty of procedural fairness — Employee was protected by contract and was able to obtain contractual remedies related to dismissal.

Labour and employment law --- Employment law — Termination and dismissal — Practice and procedure — Judicial review of adjudicative decisions

Labour and employment law --- Public service employees — Termination of employment — Practice and procedure

Jurisdiction of adjudicator to inquire into reasons underlying dismissal where no cause is alleged — Employee was employed by Province as legal officer and court clerk — Performance issues arose and employee was disciplined — Province later dismissed employee with four months' notice, and did not allege cause for dismissal — Employee grieved under Public Service Labour Relations Act ("PSLRA"), alleging that dismissal was actually for cause, and he was not given opportunity to correct his performance prior to dismissal — After interpreting sections of PSLRA and Civil Service Act, adjudicator determined he had jurisdiction to inquire into reasons for employee's dismissal — Adjudicator held that employee was denied procedural fairness and reinstated him, but provisionally assessed notice period to be eight months — Province applied successfully for judicial review — Application judge held that adjudicator lacked jurisdiction to inquire into true reasons for dismissal, and that adjudicator erred in ruling that employee had been denied procedural fairness — Employee unsuccessfully appealed to Court of Appeal — Employee appealed to Supreme Court of Canada — Appeal dismissed — Adjudicator's decision regarding his jurisdiction was not reasonable — Adjudicator adopted fatally flawed reasoning process that was inconsistent with employment contract by giving PSLRA interpretation that allowed him to inquire into reasons for dismissal when employer had right not to provide such reasons — Combined effect of PSLRA sections could not, on any reasonable interpretation, remove employer's right under contract law to discharge employee with reasonable notice or pay in lieu.

Labour and employment law --- Public service employees — Appeal and judicial review — Standard of review

Decision of adjudicator — Employee was employed by Province as legal officer and court clerk — Performance issues arose and employee was disciplined — Province later dismissed employee with four months' notice, and did not allege cause for dismissal — Employee grieved under Public Service Labour Relations Act ("PSLRA"), alleging that dismissal was actually for cause and he was not given opportunity to correct his performance prior to dismissal — After interpreting section of PSLRA and Civil Service Act ("CSA"),

adjudicator determined he had jurisdiction to inquire into reasons for employee's dismissal — Adjudicator held that employee was denied procedural fairness and reinstated him — Province applied successfully for judicial review — Application judge held that adjudicator was incorrect in concluding that he had jurisdiction to inquire into true reasons for dismissal, and that adjudicator erred in ruling that employee had been denied procedural fairness — Employee unsuccessfully appealed to Court of Appeal — Employee appealed to Supreme Court of Canada — Appeal dismissed — Appropriate standard of review of adjudicator's interpretation of PSLRA and s. 20 of CSA was reasonableness — Question was whether PSLRA sections permitted adjudicator to inquire into employer's reasons for dismissing employee with notice or pay in lieu, which was question of law — Inclusion of full privative clause in PSLRA gave rise to strong indication that reasonableness standard of review should apply — Nature of question was not of central importance to legal system and outside specialized expertise of adjudicator, which also suggested reasonableness standard of review.

Administrative law --- Standard of review — General principles

Employee was employed by Province as legal officer and court clerk — Performance issues arose and employee was disciplined — Province later dismissed employee with four months' notice, and did not allege cause for dismissal — Employee grieved under Public Service Labour Relations Act, alleging that dismissal was actually for cause and he was not given opportunity to correct his performance prior to dismissal — Adjudicator held that employee was denied procedural fairness and reinstated him — Province applied successfully for judicial review — Application judge held that adjudicator's decision on merits failed to meet reasonableness standard of review — Application judge held that adjudicator's jurisdiction in circumstances was limited to assessing reasonableness of notice period — Employee unsuccessfully appealed to Court of Appeal — Employee appealed to Supreme Court of Canada — Appeal dismissed — It was necessary to reconsider both number and definitions of various standards of review, and analytical process employed to determine which standard applies in a given situation — Analytical problems that arose in trying to apply different standards of review undercut any conceptual usefulness created by inherently greater flexibility of having multiple standards of review — Two variants of reasonableness review, reasonableness simpliciter and patent unreasonableness, should be collapsed into single form of "reasonableness" review — Result was system of judicial review comprising two standards: correctness and reasonableness.

Labour and employment law --- Public service employees — Termination of employment — Dismissal — Common law right to dismiss at pleasure

Distinction between office holder and contractual employee — Employee was employed by Province as legal officer and court clerk — Performance issues arose and employee was disciplined — Province later dismissed employee with four months' notice, and did not allege cause for dismissal — Employee grieved under Public Service Labour Relations Act, alleging that dismissal was actually for cause and he was not given opportunity to correct his performance prior to dismissal — Adjudicator held that employee was denied procedural

fairness and reinstated him, but provisionally assessed notice period to be eight months — Province applied successfully for judicial review — Application judge held that adjudicator's decision failed to meet reasonableness standard of review — Application judge held that adjudicator's jurisdiction in circumstances was limited to assessing reasonableness of notice period — Employee unsuccessfully appealed to Court of Appeal — Employee appealed to Supreme Court of Canada — Appeal dismissed — Distinction between office holder and contractual employee for purposes of public law duty of fairness was problematic and should be done away with — Distinction was difficult to apply in practice and did not correspond with justifications for imposing public law procedural fairness requirements — Where relationship is contractual, it should be viewed as any other private law employment relationship regardless of an employee's status as office holder — Public authority which dismisses employee pursuant to contract of employment should not be subject to any additional public law duty of fairness — Where public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law.

Droit du travail et de l'emploi --- Droit de l'emploi — Cessation et licenciement — Cessation de l'emploi par l'employeur — Procédure au moment du licenciement — Équité procédurale Employé travaillait comme conseiller juridique et greffier pour un ministère de la Justice provincial (« ministère ») — Rendement de l'employé a été remis en question et l'employé a été réprimandé — Ministère a, par la suite, congédié l'employé sans motif moyennant un préavis de quatre mois — Employé a déposé un grief en vertu de la Loi relative aux relations de travail dans les services publics (« LRTSP »), alléguant qu'en fait, il avait été congédié pour une raison mais qu'il n'avait pas eu la chance de corriger son rendement avant d'être congédié — Après avoir interprété des dispositions de la LRTSP et de la Loi sur la Fonction publique (« LFP »), l'arbitre a conclu qu'il avait compétence pour s'enquérir des raisons de la cessation d'emploi de l'employé — Arbitre a conclu que l'employé n'avait pas eu droit à l'équité procédurale et l'a réintégré — Ministère a déposé une demande de contrôle judiciaire avec succès — Juge de révision a conclu que l'arbitre avait erré en concluant qu'il avait compétence pour s'enquérir des raisons véritables du congédiement et en statuant que l'employé n'avait pas eu droit à l'équité procédurale — Employé a interjeté appel sans succès — Employé a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Cour de révision a annulé à bon droit la décision de l'arbitre — Arbitre a erré dans son application de l'obligation d'équité en imposant au ministère des exigeances d'équité procédurale allant au-delà des obligations contractuelles de ce dernier et en ordonnant la réintégration de l'employé — Employé était à la fois titulaire d'une charge publique et employé contractuel du ministère — Article 20 de la LFP prévoyait qu'à titre de fonctionnaire, il ne pouvait être congédié que suivant les règles contractuelles ordinaires — Il n'était pas nécessaire de tenir compte de quelque obligation d'équité procédurale que ce soit en droit public — Employé était protégé par un contrat et a pu obtenir des mesures de réparation de nature contractuelle en liaison avec son congédiement.

Droit du travail et de l'emploi --- Droit de l'emploi — Cessation et licenciement — Procédure — Révision judiciaire d'une sentence arbitrale

Droit du travail et de l'emploi --- Fonctionnaires — Cessation d'emploi — Procédure

Compétence d'un arbitre pour s'enquérir des raisons d'un congédiement sans cause alléguée — Employé travaillait comme conseiller juridique et greffier pour un ministère de la Justice provincial (« ministère ») — Rendement de l'employé a été remis en question et l'employé a été réprimandé — Ministère a, par la suite, congédié l'employé sans motif moyennant un préavis de quatre mois — Employé a déposé un grief en vertu de la Loi relative aux relations de travail dans les services publics (« LRTSP »), alléguant qu'en fait, il avait été congédié pour une raison mais qu'il n'avait pas eu la chance de corriger son rendement avant d'être congédié — Après avoir interprété des dispositions de la LRTSP et de la Loi sur la Fonction publique (« LFP »), l'arbitre a conclu qu'il avait compétence pour s'enquérir des raisons de la cessation d'emploi de l'employé — Arbitre a conclu que l'employé n'avait pas eu droit à l'équité procédurale et l'a réintégré, mais a subsidiairement évalué la période de préavis à huit mois — Ministère a déposé une demande de contrôle judiciaire avec succès — Juge de révision a conclu que l'arbitre n'avait pas compétence pour s'enquérir des raisons véritables du congédiement et avait erré en statuant que l'employé n'avait pas eu droit à l'équité procédurale — Employé a interjeté appel sans succès — Employé a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Décision de l'arbitre concernant sa compétence n'était pas raisonnable — En concluant que la LRTSP lui permettait de rechercher les motifs du congédiement, alors que l'employeur avait le droit de ne pas les préciser, l'arbitre a tenu un raisonnement foncièrement incompatible avec le contrat d'emploi et, de ce fait, entaché d'un vice fatal — Application concomitante des dispositions de la LRTSP ne saurait raisonnablement supprimer le droit contractuel de l'employeur de congédier un employé avec préavis raisonnable ou indemnité en tenant lieu.

Droit du travail et de l'emploi --- Fonctionnaires — Appel et contrôle judiciaire — Norme de contrôle

Sentence arbitrale — Employé travaillait comme conseiller juridique et greffier pour un ministère de la Justice provincial (« ministère ») — Rendement de l'employé a été remis en question et l'employé a été réprimandé — Ministère a, par la suite, congédié l'employé sans motif moyennant un préavis de quatre mois — Employé a déposé un grief en vertu de la Loi relative aux relations de travail dans les services publics (« LRTSP »), alléguant qu'en fait, il avait été congédié pour une raison mais qu'il n'avait pas eu la chance de corriger son rendement avant d'être congédié — Après avoir interprété des dispositions de la LRTSP et de la Loi sur la Fonction publique (« LFP »), l'arbitre a conclu qu'il avait compétence pour s'enquérir des raisons de la cessation d'emploi de l'employé — Arbitre a conclu que l'employé n'avait pas eu droit à l'équité procédurale et l'a réintégré — Ministère a déposé une demande de contrôle judiciaire avec succès — Juge de révision a conclu que l'arbitre avait erré en concluant qu'il avait compétence pour s'enquérir des raisons véritables du congédiement et en statuant que l'employé n'avait pas eu droit à l'équité procédurale — Employé a interjeté

appel sans succès — Employé a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Interprétation de la LRTSP et de l'art. 20 de la LFP par l'arbitre devait être révisée selon la norme de la décision raisonnable — Question de savoir si les dispositions de la LRTSP autorisaient l'arbitre à s'enquérir des motifs du congédiement de l'employé avec préavis ou indemnité en tenant lieu était une question de droit — Présence d'une clause privative dans la LRTSP militait clairement en faveur d'un contrôle selon la norme de la décision raisonnable — De par sa nature, la question ne revêtait pas une importance capitale pour le système juridique et n'était pas étrangère au domaine d'expertise de l'arbitre, ce qui favorisait encore le critère de la décision raisonnable.

Droit administratif --- Norme de contrôle — Principes généraux

Employé travaillait comme conseiller juridique et greffier pour un ministère de la Justice provincial (« ministère ») — Rendement de l'employé a été remis en question et l'employé a été réprimandé — Ministère a, par la suite, congédié l'employé sans motif moyennant un préavis de quatre mois — Employé a déposé un grief en vertu de la Loi relative aux relations de travail dans les services publics (« LRTSP »), alléguant qu'en fait, il avait été congédié pour une raison mais qu'il n'avait pas eu la chance de corriger son rendement avant d'être congédié — Arbitre a conclu que l'employé n'avait pas eu droit à l'équité procédurale et l'a réintégré — Ministère a déposé une demande de contrôle judiciaire avec succès — Juge de révision a conclu que la sentence arbitrale, quant au fond de l'affaire, ne satisfaisait pas à la norme de la décision raisonnable — Juge de révision a conclu que, dans les circonstances, le rôle de l'arbitre se limitait à l'examen de la durée du préavis — Employé a interjeté appel sans succès — Employé a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Il était nécessaire de repenser tant le nombre que la teneur des normes de contrôle, ainsi que la démarche analytique qui présidait à la détermination de la norme applicable — Difficultés analytiques soulevées par l'application des différentes normes réduisaient à néant toute utilité conceptuelle découlant de la plus grande souplesse propre à l'existence de normes de contrôle multiples — Il y avait lieu de fondre en une seule les deux normes de « raisonnabilité », à savoir la norme de la décision raisonnable simpliciter et la norme de la décision manifestement déraisonnable — Il en résultait un mécanisme de contrôle judiciaire emportant l'application de deux normes : celle de la décision correcte et celle de la décision raisonnable.

Droit du travail et de l'emploi --- Fonctionnaires — Cessation d'emploi — Congédiement — Droit issu de la Common Law permettant de congédier à volonté

Distinction entre l'employé titulaire d'une fonction et l'employé contractuel — Employé travaillait comme conseiller juridique et greffier pour un ministère de la Justice provincial (« ministère ») — Rendement de l'employé a été remis en question et l'employé a été réprimandé — Ministère a, par la suite, congédié l'employé sans motif moyennant un préavis de quatre mois — Employé a déposé un grief en vertu de la Loi relative aux relations de travail dans les services publics (« LRTSP »), alléguant qu'en fait, il avait été congédié pour une raison mais qu'il n'avait pas eu la chance de corriger son rendement avant d'être congédié — Arbitre

a conclu que l'employé n'avait pas eu droit à l'équité procédurale et l'a réintégré, mais a subsidiairement évalué la période de préavis à huit mois — Ministère a déposé une demande de contrôle judiciaire avec succès — Juge de révision a conclu que la sentence arbitrale ne satisfaisait pas à la norme de la décision raisonnable — Juge de révision a conclu que, dans les circonstances, le rôle de l'arbitre se limitait à l'examen de la durée du préavis — Employé a interjeté appel sans succès — Employé a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Établissement d'une distinction entre l'employé titulaire d'une fonction et l'employé contractuel pour les besoins de l'obligation d'équité posait problème en droit public et devrait être abandonné — Distinction était difficile à établir dans les faits et était sans corrélation avec la raison d'être de l'imposition de l'obligation d'équité procédurale — Lorsque la nature de la relation d'emploi est contractuelle, elle doit être considérée comme toute autre relation d'emploi assujettie au droit privé, même lorsque l'employé est titulaire d'une charge — Organisme public qui renvoie un employé en application d'un contrat d'emploi ne devrait pas être assujetti en outre à une obligation d'équité reconnue en droit public — Fonctionnaire qu'un contrat protège contre le congédiement injuste devait exercer un recours en droit privé.

The employee was employed as a court clerk and legal officer by the provincial Department of Justice (Province). Performance issues arose and the employee was reprimanded. While preparing for the employee's performance review, the Province concluded that the employee was not right for the job. The Province cancelled the meeting and purported to dismiss the employee without cause on reasonable notice pursuant to s. 20 of the Civil Service Act (CSA). The employee unsuccessfully grieved under the Public Service Labour Relations Act (PSLRA), claiming that he was dismissed without procedural fairness as the Province gave no reasons for its dissatisfaction with his performance, and he had no opportunity to respond to the concerns. The grievance was referred to adjudication. A preliminary issue arose as to whether the adjudicator was authorized to assess the reasons underlying the decision to dismiss, as cause was not alleged. The adjudicator held that the employee was entitled to adjudication as to whether the dismissal with notice was in fact for cause, and found he had jurisdiction to consider the merits. The adjudicator found that the dismissal was not disciplinary.

The adjudicator noted that the employee's employment was "hybrid in character" as he was a legal officer under the CSA and an office holder at pleasure as court clerk. The adjudicator held that the employee was entitled to procedural fairness, and declared the termination void ab initio. The adjudicator ordered reinstatement, but provisionally assessed the notice period at eight months. The Province applied for judicial review.

The application judge held that a correctness standard of review applied to the preliminary issue. The application judge ruled that the adjudicator had overlooked the effects of s. 20 of the CSA and had misinterpreted certain procedural sections of the PSLRA, giving them a substantive interpretation. The application judge held that the adjudicator lacked jurisdiction to inquire into the reasons for dismissal, and quashed his preliminary ruling.

The application judge held that the adjudicator's reasons for his decision on the merits did not meet a reasonableness simpliciter standard of review, so that the reinstatement award could not stand. It was held that the employee received procedural fairness due to the grievance hearing. The reinstatement order was quashed, but the provisional award of eight months' notice was upheld. The employee appealed.

The Court of Appeal held that the application judge had erred in adopting a correctness standard of review of the adjudicator's preliminary decision. The Court of Appeal found that a reasonableness standard of review applied to the adjudicator's decisions, and held that the decisions were unreasonable. The appeal was dismissed. The employee appealed to the Supreme Court of Canada.

Held: The appeal was dismissed.

Bastarache, LeBel JJ. (McLachlin C.J.C., Fish, Abella JJ. concurring): It was necessary to reconsider the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. The analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review. The two variants of reasonableness review should be collapsed into a single form of "reasonableness" review. The result is a system of judicial review comprising two standards — correctness and reasonableness.

The appropriate standard of review of the adjudicator's interpretation of the PSLRA and s. 20 of the CSA was reasonableness. The question of whether the PSLRA sections permitted the adjudicator to inquire into the employer's reasons for dismissal of the employee with notice was a question of law. The legislative regime and purpose, and the inclusion of a full privative clause in the PSLRA, favoured a standard of reasonableness. The nature of the question was not of central importance to the legal system and outside the specialized expertise of the adjudicator, which also suggested a reasonableness standard.

The preliminary decision was unreasonable. By giving the PSLRA an interpretation that allowed him to inquire into the reasons for discharge when the Province had the right not to provide, or even have, such reasons, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and fatally flawed. The adjudicator's decision treated the employee as a unionized employee when he was not. The combined effect of the PSLRA sections could not, on any reasonable interpretation, remove the employer's right under contract law to discharge an employee with reasonable notice or pay in lieu.

The adjudicator's decision was correctly struck down on judicial review. The employee was a contractual employee of the Province in addition to being a public office holder. Section 20 of the CSA provides that, as a civil servant, he could only be dismissed in accordance with the ordinary rules of contract. In the circumstances, it was unnecessary to consider any public law duty of fairness. The Province was fully within its rights to dismiss the employee

without a hearing with pay in lieu of notice. The employee was able to obtain contractual remedies for his dismissal.

Binnie, J. (concurring): The appeal should be dismissed. The employee's employment relationship with the Province was governed by contract. The Province chose to exercise its right to dismiss the employee without alleging cause. The adjudicator adopted an unreasonable interpretation of s. 20 of the CSA and of the PSLRA sections. The employee was not unionized, and his employment was terminated in accordance with contract law. Public law principles of fairness were not applicable.

The need for a re-examination of the Canadian approach to judicial review of administrative decision is widely recognized, but the majority's reasons did not deal with the system as a whole: they focused on administrative tribunals. In that context they reduced the applicable standards from three to two, but retained the pragmatic and functional analysis, although it is now to be called the standard of review analysis. A broader reappraisal is called for. The present "pragmatic and functional" approach is more complicated than is required by the subject matter.

Deschamps, J. (concurring): The appeal should be dismissed. The majority's decision on the issue of natural justice was agreed with.

Since the common law, not the adjudicator's enabling statute, was the starting point of the analysis, and since the adjudicator did not have specific expertise in interpreting the common law, the reviewing court did not have to defer to his decision on the basis of his expertise. The standard of review was correctness.

In the case at bar, the adjudicator's role was limited to evaluating the length of notice. The adjudicator erred in his interpretation and application of the PSLRA sections, and overlooked common law rules. The adjudicator did not even consider the common law rules. Even if deference had been owed to the adjudicator, his interpretation could not have stood.

Employé travaillait comme conseiller juridique et greffier pour un ministère de la Justice provincial (« ministère »). Le rendement de l'employé a été remis en question et l'employé a été réprimandé. En préparant l'évaluation de rendement de l'employé, le ministère s'est rendu compte qu'il n'était pas fait pour le travail. Le ministère a annulé la rencontre et a pris la décision de mettre fin à l'emploi de l'employé sans motif moyennant un préavis raisonnable, conformément à l'art. 20 de la Loi sur la Fonction publique (« LFP »).

L'employé a vainement déposé un grief en vertu de la Loi relative aux relations de travail dans les services publics (« LRTSP »), alléguant qu'il avait été congédié au mépris de l'équité procédurale en raison du fait que le ministère ne lui avait pas précisé ses motifs d'insatisfaction relativement à son rendement et qu'il n'avait pas eu la chance de répondre aux reproches. Le grief a fait l'objet d'un arbitrage. S'est alors posé la question préjudicielle de savoir si l'arbitre était autorisé à déterminer les raisons de la décision du ministère de mettre fin à l'emploi, puisque les motifs de congédiement n'avaient pas été révélés. L'arbitre a statué que l'employé avait droit à une décision arbitrale quant à savoir si son congédiement avec préavis constituait

en fait un congédiement pour motif et a conclu qu'il avait compétence pour rendre pareille décision. L'arbitre a conclu que le congédiement n'était pas de nature disciplinaire.

L'arbitre a relevé la « nature hybride » de l'emploi de l'employé qui était à la fois conseiller juridique soumis à la LFP et greffier nommé à titre amovible. L'arbitre a conclu que l'employé avait droit à l'équité procédurale et a déclaré nulle ab initio la cessation d'emploi. L'arbitre a ordonné la réintégration de l'employé dans ses fonctions et a jugé que ce dernier, subsidiairement, aurait droit à un préavis de huit mois. Le ministère a demandé un contrôle judiciaire.

Le juge de révision a estimé que la norme de la décision correcte s'appliquait à la question préjudicielle. Le juge de révision a statué que l'arbitre n'avait pas tenu compte de la portée de l'art. 20 de la LFP et avait considéré à tort certains articles de la LRTSP comme des dispositions substantielles plutôt que procédurales. Le juge de révision a conclu que l'arbitre n'avait pas compétence pour s'enquérir des motifs de la cessation d'emploi et a annulé sa décision sur la question préjudicielle.

Le juge de révision a conclu que les motifs de l'arbitre en ce qui a trait à la sentence arbitrale sur le fond ne satisfaisaient pas la norme de la décision raisonnable simpliciter et, qu'en conséquence, l'ordonnance de réintégration devait être annulée. Il a également conclu que l'employé avait bénéficié de l'équité procédurale du fait de l'audition de son grief par l'arbitre. L'ordonnance de réintégration a été annulée mais la décision subsidiaire portant à huit mois le préavis requis a été confirmée. L'employé a interjeté appel.

La Cour d'appel a statué que le juge de révision avait erré en appliquant la norme de la décision correcte à la décision de l'arbitre sur la question préjudicielle. La Cour d'appel était d'avis que la norme de la décision raisonnable s'appliquait aux décisions de l'arbitre et a conclu que ces décisions n'étaient pas raisonnables. L'appel a été rejeté. L'employé a formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été rejeté.

Bastarache, LeBel, JJ. (McLachlin, J.C.C., Fish, Abella, JJ., souscrivant à leur opinion): Il était nécessaire de repenser tant le nombre que la teneur des normes de contrôle, ainsi que la démarche analytique qui présidait à la détermination de la norme applicable. Les difficultés analytiques soulevées par l'application des différentes normes réduisaient à néant toute utilité conceptuelle découlant de la plus grande souplesse propre à l'existence de normes de contrôle multiples. Il y avait lieu de fondre en une seule les deux normes de raisonnabilité. Il en résultait un mécanisme de contrôle judiciaire emportant l'application de deux normes : celle de la décision correcte et celle de la décision raisonnable.

L'interprétation de la LRTSP et de l'art. 20 de la LFP par l'arbitre devait être révisée selon la norme de la décision raisonnable. La question de savoir si les dispositions de la LRTSP autorisaient l'arbitre à s'enquérir des motifs du congédiement de l'employé avec préavis était une question de droit. Le régime et l'objectif législatif, ainsi que la présence d'une clause privative dans la LRTSP, militaient en faveur d'un contrôle selon la norme de la décision raisonnable. De par sa nature, la question ne revêtait pas une importance capitale pour le

système juridique et n'était pas étrangère au domaine d'expertise de l'arbitre, ce qui favorisait encore le critère de la décision raisonnable.

La décision relative à la question préjudicielle n'était pas raisonnable. En concluant que la LRTSP lui permettait de rechercher les motifs du congédiement, alors que l'employeur avait le droit de ne pas les préciser, et même, de ne pas en avoir, l'arbitre a tenu un raisonnement foncièrement incompatible avec le contrat d'emploi et, de ce fait, entaché d'un vice fatal. Dans sa décision, l'arbitre a considéré l'employé comme un employé syndiqué alors qu'il n'en était pas un. L'application concomitante des dispositions de la LRTSP ne saurait donc raisonnablement supprimer le droit contractuel de l'employeur de congédier un employé avec préavis raisonnable ou indemnité en tenant lieu.

La cour de révision a annulé à bon droit la décision de l'arbitre. L'employé était à la fois titulaire d'une charge publique et employé contractuel du ministère. L'article 20 de la LFP prévoit qu'à titre de fonctionnaire, il ne pouvait être congédié que suivant les règles contractuelles ordinaires. Dans les circonstances, il n'était pas nécessaire de tenir compte de quelque obligation d'équité procédurale en droit public que ce soit. Le ministère pouvait parfaitement congédier l'employé en lui versant une indemnité tenant lieu de préavis, sans lui offrir la possibilité d'être entendu. L'employé a pu obtenir des mesures de réparation de nature contractuelle en liaison avec son congédiement.

Binnie, J. (souscrivant à l'opinion de la majorité) : Le pourvoi devrait être rejeté. Le lien d'emploi entre l'employé et la ministère était régi par un contrat. Le ministère a choisi d'exercer son droit de mettre fin à l'emploi de l'employé sans invoquer de motif. L'arbitre a interprété l'art. 20 de la LFP ainsi que les dispositions de la LRTSP d'une manière déraisonnable. L'employé était un employé non syndiqué, et le ministère a mis fin à son emploi conformément au droit contractuel. Les principes du droit public relatifs à l'équité procédurale ne s'appliquaient pas dans les circonstances.

La nécessité d'un réexamen du contrôle judiciaire des décisions administratives au Canada est largement reconnue, mais les motifs des juges majoritaires ne s'attaquaient pas au mécanisme dans son ensemble : leurs motifs visaient les tribunaux administratifs. Dans ce contexte, ils ramenaient le nombre de normes de contrôle applicables de trois à deux, mais conservaient l'analyse pragmatique et fonctionnelle, rebaptisée « analyse relative à la norme de contrôle ». Une réévaluation plus vaste s'imposait. L'actuelle analyse « pragmatique et fonctionnelle » est plus compliquée qu'elle ne le devrait.

Deschamps, J. (Charron, Rothstein, JJ., souscrivant à l'opinion de la majorité): Le pourvoi devrait être rejeté. La décision de la majorité concernant le respect de la justice naturelle était bien fondée.

La décision ne commandait pas la retenue, car c'était la Common Law, et non la loi habilitante, qui était le point de départ de l'analyse et l'arbitre ne possédait en ce domaine aucune expertise particulière. La norme de contrôle applicable était celle de la décision correcte.

En l'espèce, le rôle de l'arbitre se limitait à l'examen de la durée du préavis. Il a eu tort dans son interprétation et son application dispositions de la LRTSP et a ignoré les règles de la Common Law. L'arbitre n'a même pas envisagé les règles de la common law. Même si l'arbitre avait eu droit à la déférence, son interprétation n'aurait pu être retenue.

Annotation

The Supreme Court of Canada recently handed down a decision, in *New Brunswick (Board of Management) v. Dunsmuir*, reviewing the proper approach to judicial review of administrative decision makers. The Court decided that judicial review should now only include two standards: correctness and reasonableness.

At first blush one might believe this would strengthen the arguments of those from the immigration bar who try to convince the Federal Court that there should be reluctance to defer to the decision making of immigration tribunals or officers. Previously the standards of review also included the standard of patent unreasonableness and the corresponding high degree of deference. So, if those are taken out of the equation, then surely that should make it easier to attract judicial attention?

A careful reading of the case, however, suggests that our Department of Justice colleagues will be able to rely on parts of this decision when arguing that the Court ought to defer to the decision of a decision maker.

Mr. Dunsmuir was employed by the Province of New Brunswick. His employment was terminated and he commenced a grievance process as allowed for under the *Public Service Labour Relations Act*. That grievance was denied and then referred to adjudication. A preliminary issue arose as to whether the adjudicator was authorized to determine the reasons underlying the province's decision to terminate. The adjudicator concluded that he could make such a determination and decided that Mr. Dunsmuir's termination was void *ab initio*. He also decided that Mr. Dunsmuir was entitled to and did not receive procedural fairness.

On judicial review the Court of Queens Bench applied the correctness standard and quashed the adjudicator's preliminary decision. On the merits the Court found that Mr. Dunsmuir had received procedural fairness. The Court of Appeal held that the proper standard with respect to the adjudicator's statutory authority was reasonableness *simpliciter*, not correctness, and that the adjudicator's decision was not unreasonable. It agreed with the reviewing judge that Mr. Dunsmuir's right to procedural fairness had not been breached.

The Supreme Court dismissed the appeal, but when doing so, reconsidered the system of judicial review in Canada. All members of the Court agreed that the appeal should be dismissed, but there were three sets of reasons.

Bastarache and LeBel JJ. wrote reasons on behalf of themselves and McLachlin C.J. and Fish and Abella JJ.

The Justices noted that the current approach to judicial review involves three standards of review which range from correctness, where no deference is shown, to patent unreasonableness, which is the most deferential to the decision maker; the standard of reasonableness *simpliciter* lying, theoretically, somewhere in between. They concluded that there ought to be two standards of review — correctness and reasonableness.

In *Dunsmuir* the Court acknowledged that the operation of the three standards of review have resulted in practical and theoretical difficulties. For example, the difference between patent unreasonableness and reasonableness *simpliciter* was in many ways "illusory". [1] The conclusion they reached was that the two variants of reasonableness review should be collapsed into a single form of "reasonableness" review, the result being a system of judicial review comprising two standards — correctness and reasonableness.

The Court went on to try to define more clearly what reasonableness means. They stated that reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process; and concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [2] They cautioned that the move towards a single reasonableness standard does not pave the way for a more intrusive review by the courts. [3] The standard of correctness must be maintained in respect of jurisdictional and some other questions of law. In questions of fact, discretion or policy, deference will usually apply. That same standard should apply to the review of questions where the "legal and factual issues are intertwined with and cannot be readily separated". [4]

Binnie J. offered his own reasons that no doubt reflect his considerable experience in private practice. He pointed to the very practical problems of litigating against a backdrop of uncertainty of which standard of review is to be considered. As he put it " . . . the law of judicial review should be pruned of some of its unduly subtle, unproductive, or esoteric features". [5] But the reduction of two standards of review does not mean the judge should necessarily consider his or her own view of reasonableness. Rather the judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose. As he put it, "'[r]easonableness' is a big tent that will have to accommodate a lot of variables that inform and limit a court's review of the outcome of administrative decision making". [6] The presumption from the outset should be that the reasonableness will be the standard of review. Moreover it should also be presumed that the decision under review is reasonable until the applicant shows otherwise. [7]

According to Binnie J. a legal question may not always attract the correctness standard. The correctness standard will apply when the decision rests on an error in the determination of a legal issue not codified to the administrator.

So what has changed? The Court was of the view that the existing scheme for judicial review was unnecessarily complicated. They were of the view that reducing the standards of review from three to two would help diminish unhelpful and unproductive intellectual exercises. Although there may not now be any "patent unreasonableness" standard, it is clear that the Court is still of the view that in many instances deference ought to be given to administrative decision makers. As for reasonableness *simpliciter*, a judge will have to identify and consider a range of possibilities.

In the context of immigration in particular, perhaps the practical consequences for our clients may not end up being so significant. Decisions are made by immigration tribunals and officers and when our clients are unhappy with those decisions they can retain us to ask the court to review the decisions or the decision-making process. There is no privative clause that comes into play. Notwithstanding the sophisticated intellectual and legal reasoning that underpins a case such as *Dunsmuir*, some will have the view that the reality is that if a judge decides that the decision being reviewed is a wrong-headed one, then the judge may cite an appropriate standard of review, but it is a visceral response that is dictating the ultimate decision rather than an intellectual exploration of legal terrain where the right decision is discovered.

Time will tell whether this decision adds clarity to a difficult area of the law.

Randolph K. Hahn

Dunsmuir is a very important decision for at least four reasons:

Two standards of review, not three

First, *Dunsmuir* attempts to simplify the logic-tree for judicial review by merging the two deferential standards of review, thereby reducing the number of standards from three to two. From now on, the single deferential standard will be "reasonableness" (not "patent unreasonableness" as was the case pre-*Southam*).

What is "reasonable" will depend on the context, which may require greater or lesser deference. This concept of "reasonableness" is concerned mostly with the existence of justification, transparency, and intelligibility within the decision-making process, and with whether the decision falls within a range of possible outcomes (and, therefore, is different from the concept of "reasonableness *simpliciter*" in *Ryan*, which focused solely on the

reasoning process used by the statutory delegate). The deferential reasonableness standard will usually apply where there is a privative clause; the question is one of fact, discretion, or policy; where the decision-maker is interpreting its own statute or statues closely connected to its function with which it will have particular familiarity; or where the administrative tribunal has developed particular expertise in the application of a common law or civil law rule in relation to a specific statutory context. As Justice Binnie notes, this concept of "reasonableness" is a "big tent". Might we not end up with much the same arguments as before, just dressed up in different rhetoric?

The explicit merging of the two deferential standards into "reasonableness" should accomplish what was implicit in *Voice*. From now on, submissions and judicial attention should focus squarely on the particular manifestation in which it is alleged that a particular decision is unreasonable, and will remove the possibility that a decision might be said to be "unreasonable" but not "patently unreasonable". Although the abolition of the "patently unreasonable" standard will probably disquiet members of the labour bar in particular (who pushed back strongly against the implication in *Voice* that the "patently unreasonable" standard of review should be rarely if ever used), the Court has signalled that the movement to the new, single deferential standard is not to be taken as an invitation for greater judicial scrutiny.

Precedent may determine the standard of review

Secondly, the Court has made it clear that there does not necessarily need to be an analysis of all four of the *Pushpanathan* factors in every case. Over time, precedent may exist to determine the standard of review with regard to a particular category of question in a particular statutory context. If not, then various contextual factors will need to be analyzed, but some factors may be determinative about the application of either the correctness or the reasonableness standard.

Possible deference on some questions of law

Thirdly, there is some uncertainty about the circumstances in which the courts should defer on a question of law (not being clearly jurisdictional in nature). The majority decision contemplates that deference may be appropriate where the decision-maker is interpreting its own statute *unless the question is one of general law that is both of central importance to the legal system and outside the adjudicator's specialized area of expertise* (in which case correctness would apply). Justice Binnie thinks that the exception expressed in the italicized words in the previous sentence is too deferential-correctness should apply to all questions concerning the common law and the interpretation of a statute (with the exception of an interpretation of the statutory delegate's enabling-or "home"-statute, or a rule or statute closely connected with it, which requires the expertise of the statutory delegate). In addition,

it is clear that Justice Binnie and Justice Deschamps contemplate that correctness should be the standard of review where there is a full statutory right of appeal; it is not clear whether the majority would defer on some questions of law where there is a full statutory right of appeal.

Unresolved issues about the standards of review

In addition to the working out of these three aspects of the court's discussion of standards-of-review analysis, *Dunsmuir* still leaves a number of unanswered questions. For example, the majority's direction to stop using the phrase "pragmatic and functional approach" (which comes from *Bibeault*) does not provide an alternative method for determining whether a particular matter is "jurisdictional" (in the narrow sense of having jurisdiction to embark on the matter at hand) or otherwise subject to the correctness standard, as opposed to having been intended by the legislator to be left to the statutory decision-maker (and, therefore, subject to the deferential reasonableness standard). If the court's approach is necessarily contextual, shouldn't the appraisal of that context be done in a pragmatic and functional manner to determine the intention of the legislator? Similarly, it is not clear whether the majority contemplates that all issues in administrative law will engage one or other of these two standards of review. Although Justice Binnie raises this issue, surely he errs in suggesting that the correctness standard should be applied to questions of natural justice and procedural fairness, because such questions are answered by reference to whether the process used was "fair" (not "correct", and not "reasonable"). Other issues in administrative law may also raise other concerns which are not easily addressed by the "correctness" or "reasonableness" standards of review (such as malice, discrimination, abuse of discretion, abuse of public office, contractual or tortious liability of public authorities, and the problem of concurrent jurisdictions). Finally, although each judgment refers frequently to "expertise", *Dunsmuir* does not clarify what is meant by this concept, or how the courts know or determine if a statutory delegate has expertise with respect to a particular matter. Although there are hints that experience might equate to expertise, is this always the case-or could a statutory delegate consistently and over a long period of time incorrectly interpret a provision of its constating legislation?

Procedural fairness does not apply to contracts of employment merely because they have a statutory backdrop or also involve holding a public office

Fourthly, *Dunsmuir* makes it clear that the principles of procedural fairness do not apply to the termination of employment contracts just because there is a statutory backdrop to the contract or the person also holds a statutory office. This significantly restricts the application of the decision in *Knight v. Indian Head*, which had previously extended procedural safeguards to these circumstances. This makes imminent good sense in the circumstances of this particular case, where the New Brunswick Legislature had specified that the common law rules for terminating employment contracts were to be applied to non-

unionized public employees. However, not all statutes governing public employment or the holding of a public office specify the terms under which that status may be terminated. If the statute does not contain such a provision, does it follow that all holders of a public office also have a contractual employment relationship with some governmental authority? Must there be specific statutory authority to enter into a contractual employment relationship with the holder of a public office (assuming the employment contract is not inconsistent with the statutory provisions governing the office)? Is the nature of at least some public offices incompatible with the concept of a separate employment contract — for example, is the nature of the public office of Conflict of Interest Commissioner of Parliament or a provincial legislative assembly sufficiently important that it would be inappropriate for there to be a contract of employment between the commissioner and some representative of the executive (as opposed to statutory provisions)?

David Phillip Jones, Q.C.

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Inuit Tapirisat of Canada v. Canada (Attorney General) (1980), 1980 CarswellNat 633, [1980] 2 F.C.R. 735, [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1, 33 N.R. 304, 1980 CarswellNat 633F (S.C.C.) — referred to

Kane v. University of British Columbia (1980), 1980 CarswellBC 1, 1980 CarswellBC 599, [1980] 1 S.C.R. 1105, 18 B.C.L.R. 124, [1980] 3 W.W.R. 125, 31 N.R. 214, 110 D.L.R. (3d) 311 (S.C.C.) — referred to

Knight v. Indian Head School Division No. 19 (1990), [1990] 1 S.C.R. 653, 69 D.L.R. (4th) 489, [1990] 3 W.W.R. 289, 30 C.C.E.L. 237, 90 C.L.L.C. 14,010, 43 Admin. L.R. 157, 83 Sask. R. 81, 1990 CarswellSask 146, 1990 CarswellSask 408, 106 N.R. 17 (S.C.C.) — considered

Malloch v. Aberdeen Corp. (1971), [1971] 2 All E.R. 1278, [1971] 1 W.L.R. 1578 (U.K. H.L.) — referred to

Martin v. Nova Scotia (Workers' Compensation Board) (2003), 2003 CarswellNS 360, 2003 CarswellNS 361, 2003 SCC 54, (sub nom. *Workers' Compensation Board (N.S.) v. Martin*) 217 N.S.R. (2d) 301, (sub nom. *Workers' Compensation Board (N.S.) v. Martin*) 683 A.P.R. 301, 310 N.R. 22, (sub nom. *Nova Scotia (Workers' Compensation Board) v. Martin*) [2003] 2 S.C.R. 504, 110 C.R.R. (2d) 233, (sub nom. *Nova Scotia (Workers' Compensation Board) v. Martin*) 231 D.L.R. (4th) 385, 28 C.C.E.L. (3d) 1, 4 Admin. L.R. (4th) 1 (S.C.C.) — referred to

Martineau v. Matsqui Institution (No. 2) (1979), [1980] 1 S.C.R. 602, 1979 CarswellNat 2, 1979 CarswellNat 3, 13 C.R. (3d) 1 (Eng.), 15 C.R. (3d) 315 (Fr.), 50 C.C.C. (2d) 353, 106 D.L.R. (3d) 385, 30 N.R. 119 (S.C.C.) — referred to

McLeod v. Egan (1974), [1975] 1 S.C.R. 517, 46 D.L.R. (3d) 150, (sub nom. *U.S.W.A., Local 2894 v. Galt Metal Industries Ltd.*) 74 C.L.L.C. 14,220, 5 L.A.C. (2d) 336 (note), 1974 CarswellOnt 235, 1974 CarswellOnt 235F, 2 N.R. 443 (S.C.C.) — referred to

Moreau-Bérubé c. Nouveau-Brunswick (2002), (sub nom. *Conseil de la magistrature (N.-B.) v. Moreau-Bérubé*) 245 N.B.R. (2d) 201, (sub nom. *Conseil de la magistrature (N.-B.) v. Moreau-Bérubé*) 636 A.P.R. 201, [2002] 1 S.C.R. 249, 2002 SCC 11, 2002 CarswellNB 46, 2002 CarswellNB 47, 36 Admin. L.R. (3d) 1, (sub nom. *Nouveau-Brunswick (Conseil de la magistrature) v. Moreau-Bérubé*) 281 N.R. 201, (sub nom. *Moreau-Bérubé v. New Brunswick (Judicial Council)*) 209 D.L.R. (4th) 1 (S.C.C.) — referred to

Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police (1978), [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671, 78 C.L.L.C. 14,181, 23 N.R. 410, 1978 CarswellOnt 609F, 1978 CarswellOnt 609 (S.C.C.) — considered

Pushpanathan v. Canada (Minister of Employment & Immigration) (1998), 43 Imm. L.R. (2d) 117, 226 N.R. 201, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration)*) 160 D.L.R. (4th) 193, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration)*) [1998] 1 S.C.R. 982, 11 Admin. L.R. (3d) 1, 6 B.H.R.C. 387, [1999] I.N.L.R. 36, 1998 CarswellNat 830, 1998 CarswellNat 831 (S.C.C.) — referred to

Q. v. College of Physicians & Surgeons (British Columbia) (2003), 2003 SCC 19, 2003 CarswellBC 713, 2003 CarswellBC 743, 11 B.C.L.R. (4th) 1, 223 D.L.R. (4th) 599, 48 Admin. L.R. (3d) 1, (sub nom. *Dr. Q., Re*) 302 N.R. 34, [2003] 5 W.W.R. 1, (sub nom. *Dr. Q. v. College of Physicians & Surgeons of British Columbia*) [2003] 1 S.C.R. 226, (sub nom. *Dr. Q., Re*) 179 B.C.A.C. 170, (sub nom. *Dr. Q., Re*) 295 W.A.C. 170 (S.C.C.) — referred to

Québec (Commission des droits de la personne & des droits de la jeunesse) c. Québec (Procureure générale) (2004), (sub nom. *Québec (Commission des droits de la personne & des droits de la jeunesse) v. Quebec (Attorney General)*) 240 D.L.R. (4th) 577, [2004] 2 S.C.R. 185, (sub nom. *Québec (Procureur général) c. Québec (Commission des drotis de la personne & des drotis de la jeunesse)*) 49 C.H.R.R. D/413, 2004 SCC 39, 2004 CarswellQue 1343, 2004 CarswellQue 1344, (sub nom. *Commission des droits de la personne & des droits de la jeunesse (Que.) v. Quebec (Attorney General)*) 321 N.R. 290, 128 L.A.C. (4th) 1, (sub nom. *Quebec (Morin) v. Quebec (Attorney General)*) 2004 C.L.L.C. 230-023, 15 Admin. L.R. (4th) 1 (S.C.C.) — referred to

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Assn. Inc. v. Board of Police Commissioners of Regina) 216 W.A.C. 23, *(*sub nom. *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners)* [2000] 1 S.C.R. 360 (S.C.C.) — referred to

Reglin v. Creston (Town) (2004), 34 C.C.E.L. (3d) 123, 2004 BCSC 790, 2004 CarswellBC 1335, 32 B.C.L.R. (4th) 342 (B.C. S.C.) — referred to

Ridge v. Baldwin (1963), [1964] A.C. 40, [1963] 2 All E.R. 66, [1963] 2 W.L.R. 935 (U.K. H.L.) — considered

Rosen v. Saskatoon District Health Board (2000), 21 Admin. L.R. (3d) 102, 2000 SKQB 40, 2000 CarswellSask 107, [2000] 4 W.W.R. 606, 190 Sask. R. 161 (Sask. Q.B.) — referred to

Rosen v. Saskatoon District Health Board (2001), 2001 CarswellSask 511, [2001] 10 W.W.R. 19, 202 D.L.R. (4th) 35, 34 Admin. L.R. (3d) 235, 213 Sask. R. 61, 260 W.A.C. 61, 2001 SKCA 83 (Sask. C.A.) — referred to

Ryan v. Law Society (New Brunswick) (2003), 2003 SCC 20, 2003 CarswellNB 145, 2003 CarswellNB 146, 223 D.L.R. (4th) 577, 48 Admin. L.R. (3d) 33, 302 N.R. 1, 257 N.B.R. (2d) 207, 674 A.P.R. 207, *(*sub nom. *Law Society of New Brunswick v. Ryan)* [2003] 1 S.C.R. 247, 31 C.P.C. (5th) 1 (S.C.C.) — considered

Seshia v. Health Sciences Centre (2001), 2001 MBCA 151, 2001 CarswellMan 463, 160 Man. R. (2d) 41, 262 W.A.C. 41 (Man. C.A.) — referred to

Southeast Kootenay School District No. 5 v. B.C.T.F. (2000), *(*sub nom. *School District No. 5 (Southeast Kootenay) v. B.C.T.F. (Yellowaga))* 94 L.A.C. (4th) 56, 2000 CarswellBC 2957 (B.C. Arb.) — referred to

Suresh v. Canada (Minister of Citizenship & Immigration) (2002), 2002 SCC 1, 37 Admin. L.R. (3d) 159, [2002] 1 S.C.R. 3, 2002 CarswellNat 7, 2002 CarswellNat 8, 18 Imm. L.R. (3d) 1, 208 D.L.R. (4th) 1, 281 N.R. 1, 90 C.R.R. (2d) 1 (S.C.C.) — referred to

Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298 (1988), 95 N.R. 161, 89 C.L.L.C. 14,045, 24 Q.A.C. 244, *(*sub nom. *Union des employés de service, local 298 v. Bibeault)* [1988] 2 S.C.R. 1048, 1988 CarswellQue 125, 1988 CarswellQue 148, 35 Admin. L.R. 153 (S.C.C.) — considered

Toronto (City) v. C.U.P.E., Local 79 (2003), 232 D.L.R. (4th) 385, 9 Admin. L.R. (4th) 161, [2003] 3 S.C.R. 77, 17 C.R. (6th) 276, 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 311 N.R. 201, 2003 C.L.L.C. 220-071, 179 O.A.C. 291, 120 L.A.C. (4th) 225, 31 C.C.E.L. (3d) 216 (S.C.C.) — considered

Toronto (City) Board of Education v. O.S.S.T.F., District 15 (1997), *(*sub nom. *Board of Education of Toronto v. Ontario Secondary School Teachers' Federation District 15)* 98 O.A.C. 241, [1997] 1 S.C.R. 487, 44 Admin. L.R. (2d) 1, 97 C.L.L.C. 220-018, *(*sub nom. *Board of Education of Toronto v. Ontario Secondary School Teachers' Federation District 15)* 208 N.R. 245, [1997] L.V.I. 2831-1, 25 C.C.E.L. (2d) 153, 144 D.L.R. (4th) 385, 1997 CarswellOnt 244, 1997 CarswellOnt 245 (S.C.C.) — referred to

United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City) (2004), 46 M.P.L.R. (3d) 1, 236 D.L.R. (4th) 385, [2004] 7 W.W.R. 603, 346 A.R. 4, 320 W.A.C. 4, 318 N.R. 170, 18 R.P.R. (4th) 1, [2004] 1 S.C.R. 485, 2004 CarswellAlta 355, 2004 CarswellAlta 356, 2004 SCC 19, 26 Alta. L.R. (4th) 1, 12 Admin. L.R. (4th) 1, 50 M.V.R. (4th) 1 (S.C.C.) — referred to

VIA Rail Canada Inc. v. Canadian Transportation Agency (2007), 2007 SCC 15, 2007 CarswellNat 608, 2007 CarswellNat 609, 360 N.R. 1, 279 D.L.R. (4th) 1, 59 Admin. L.R. (4th) 1, (sub nom. *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*) [2007] 1 S.C.R. 650 (S.C.C.) — referred to

Voice Construction Ltd. v. Construction & General Workers' Union, Local 92 (2004), (sub nom. *Construction & General Workers' Union, Local 92 v. Voice Construction Ltd.*) 2004 C.L.L.C. 220-026, [2004] 7 W.W.R. 411, 2004 SCC 23, [2004] 1 S.C.R. 609, 14 Admin. L.R. (4th) 165, 29 Alta. L.R. (4th) 1, 2004 CarswellAlta 422, 2004 CarswellAlta 423 (S.C.C.) — referred to

Wallace v. United Grain Growers Ltd. (1997), 123 Man. R. (2d) 1, 159 W.A.C. 1, 152 D.L.R. (4th) 1, 1997 CarswellMan 455, 1997 CarswellMan 456, 219 N.R. 161, [1997] 3 S.C.R. 701, [1999] 4 W.W.R. 86, 36 C.C.E.L. (2d) 1, 3 C.B.R. (4th) 1, [1997] L.V.I. 2889-1, 97 C.L.L.C. 210-029 (S.C.C.) — referred to

Wells v. Newfoundland (1999), 99 C.L.L.C. 210-047, 180 Nfld. & P.E.I.R. 269, 548 A.P.R. 269, 46 C.C.E.L. (2d) 165, [1999] 3 S.C.R. 199, 15 Admin. L.R. (3d) 268, 1999 CarswellNfld 214, 1999 CarswellNfld 215, 177 D.L.R. (4th) 73, 245 N.R. 275 (S.C.C.) — referred to

Westcoast Energy Inc. v. Canada (National Energy Board) (1998), 1998 CarswellNat 266, 1998 CarswellNat 267, [1998] 1 S.C.R. 322, 223 N.R. 241, 3 Admin. L.R. (3d) 163, 156 D.L.R. (4th) 456 (S.C.C.) — referred to

Cases considered by *Binnie J.*:

Associated Provincial Picture Houses Ltd. v. Wednesbury Corp. (1947), [1947] 2 All E.R. 680, [1948] 1 K.B. 223 (Eng. C.A.) — referred to

Baker v. Canada (Minister of Citizenship & Immigration) (1999), 1 Imm. L.R. (3d) 1, [1999] 2 S.C.R. 817, 14 Admin. L.R. (3d) 173, 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22 (S.C.C.) — referred to

C.U.P.E. v. Ontario (Minister of Labour) (2003), 2003 CarswellOnt 1803, 2003 SCC 29, 2003 CarswellOnt 1770, 2003 C.L.L.C. 220-040, [2003] 1 S.C.R. 539, (sub nom. *Canadian Union of Public Employees v. Ontario (Minister of Labour)*) 173 O.A.C. 38, (sub nom. *Canadian Union of Public Employees v. Ontario (Minister of Labour)*) 66 O.R. (3d) 735 (note), 226 D.L.R. (4th) 193, (sub nom. *Canadian Union of Public Employees v. Ontario (Minister of Labour)*) 304 N.R. 76, 50 Admin. L.R. (3d) 1 (S.C.C.) — referred to

C.U.P.E., Local 963 v. New Brunswick Liquor Corp. (1979), 25 N.B.R. (2d) 237, [1979] 2 S.C.R. 227, 51 A.P.R. 237, 26 N.R. 341, 79 C.L.L.C. 14,209, 97 D.L.R. (3d) 417, N.B.L.L.C. 24259, 1979 CarswellNB 17, 1979 CarswellNB 17F (S.C.C.) — referred to

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Cooper v. Wandsworth Board of Works (1863), 143 E.R. 414, 32 L.J.C.P. 185, 14 C.B.N.S. 180 (Eng. C.P.) — referred to

Idziak v. Canada (Minister of Justice) (1992), 144 N.R. 327, 17 C.R. (4th) 161, 9 Admin. L.R. (2d) 1, 12 C.R.R. (2d) 77, [1992] 3 S.C.R. 631, 59 O.A.C. 241, 77 C.C.C. (3d) 65, 97 D.L.R. (4th) 577, 1992 CarswellOnt 1000, 1992 CarswellOnt 113 (S.C.C.) — referred to

Inuit Tapirisat of Canada v. Canada (Attorney General) (1980), 1980 CarswellNat 633, [1980] 2 F.C.R. 735, [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1, 33 N.R. 304, 1980 CarswellNat 633F (S.C.C.) — referred to

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Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch) (2001), 2001 SCC 52, 2001 CarswellBC 1877, 2001 CarswellBC 1878, (sub nom. *Ocean Port Hotel Ltd. v. Liquor Control & Licensing Branch (B.C.)*) 155 B.C.A.C. 193, (sub nom. *Ocean Port Hotel Ltd. v. Liquor Control & Licensing Branch (B.C.)*) 254 W.A.C. 193, [2001] 10 W.W.R. 1, 34 Admin. L.R. (3d) 1, 204 D.L.R. (4th) 33, 274 N.R. 116, 93 B.C.L.R. (3d) 1, [2001] 2 S.C.R. 781 (S.C.C.) — considered

Operation Dismantle Inc. v. R. (1985), [1985] 1 S.C.R. 441, 59 N.R. 1, 18 D.L.R. (4th) 481, 12 Admin. L.R. 16, 13 C.R.R. 287, 1985 CarswellNat 151, 1985 CarswellNat 664 (S.C.C.) — referred to

Roncarelli v. Duplessis (1959), 1959 CarswellQue 37, [1959] S.C.R. 121, 16 D.L.R. (2d) 689 (S.C.C.) — referred to

Ryan v. Law Society (New Brunswick) (2003), 2003 SCC 20, 2003 CarswellNB 145, 2003 CarswellNB 146, 223 D.L.R. (4th) 577, 48 Admin. L.R. (3d) 33, 302 N.R. 1, 257 N.B.R. (2d) 207, 674 A.P.R. 207, (sub nom. *Law Society of New Brunswick v. Ryan*) [2003] 1 S.C.R. 247, 31 C.P.C. (5th) 1 (S.C.C.) — referred to

Suresh v. Canada (Minister of Citizenship & Immigration) (2002), 2002 SCC 1, 37 Admin. L.R. (3d) 159, [2002] 1 S.C.R. 3, 2002 CarswellNat 7, 2002 CarswellNat 8, 18 Imm. L.R. (3d) 1, 208 D.L.R. (4th) 1, 281 N.R. 1, 90 C.R.R. (2d) 1 (S.C.C.) — referred to

Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298 (1988), 95 N.R. 161, 89 C.L.L.C. 14,045, 24 Q.A.C. 244, (sub nom. *Union des employés de service, local 298 v. Bibeault*) [1988] 2 S.C.R. 1048, 1988 CarswellQue 125, 1988 CarswellQue 148, 35 Admin. L.R. 153 (S.C.C.) — referred to

Westcoast Energy Inc. v. Canada (National Energy Board) (1998), 1998 CarswellNat 266, 1998 CarswellNat 267, [1998] 1 S.C.R. 322, 223 N.R. 241, 3 Admin. L.R. (3d) 163, 156 D.L.R. (4th) 456 (S.C.C.) — referred to

Cases considered by *Deschamps J.*:

L. (H.) v. Canada (Attorney General) (2005), 2005 SCC 25, 2005 CarswellSask 268, 2005 CarswellSask 273, 333 N.R. 1, 8 C.P.C. (6th) 199, 24 Admin. L.R. (4th) 1, 262 Sask. R. 1, 347 W.A.C. 1, [2005] 8 W.W.R. 1, 29 C.C.L.T. (3d) 1, 251 D.L.R. (4th) 604, [2005] 1 S.C.R. 401 (S.C.C.) — referred to

Toronto (City) v. C.U.P.E., Local 79 (2003), 232 D.L.R. (4th) 385, 9 Admin. L.R. (4th) 161, [2003] 3 S.C.R. 77, 17 C.R. (6th) 276, 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 311 N.R. 201, 2003 C.L.L.C. 220-071, 179 O.A.C. 291, 120 L.A.C. (4th) 225, 31 C.C.E.L. (3d) 216 (S.C.C.) — referred to

Statutes considered:

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

Generally — referred to

ss. 96-101 — referred to

Civil Service Act, S.N.B. 1984, c. C-5.1

Generally — referred to

s. 20 — considered

Employment Standards Act, S.N.B. 1982, c. E-7.2

Generally — referred to

Human Rights Act, R.S.N.B. 1973, c. H-11

Generally — referred to

Interpretation Act, R.S.C. 1985, c. I-21

s. 23(1) — referred to

Interpretation Act, R.S.N.B. 1973, c. I-13

s. 20 — referred to

Public Service Labour Relations Act, S.N.B. 1968, c. 88

s. 92(1) — referred to

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25

Generally — referred to

s. 97 — referred to

s. 97(2.1) [en. 1990, c. 30, s. 35(c)] — considered

s. 100.1 [en. 1990, c. 30, s. 40] — considered

s. 100.1(2) [en. 1990, c. 30, s. 40] — considered

s. 100.1(5) [en. 1990, c. 30, s. 40] — considered

s. 101(1) — considered

s. 101(2) — considered

Statutes considered by *Binnie J.*:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 96 — referred to

Civil Service Act, S.N.B. 1984, c. C-5.1

s. 20 — referred to

Extradition Act, R.S.C. 1985, c. E-23

Generally — referred to

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25

s. 97(2.1) [en. 1990, c. 30, s. 35(c)] — referred to

s. 100.1 [en. 1990, c. 30, s. 40] — referred to

Statutes considered by *Deschamps J.*:

Civil Service Act, S.N.B. 1984, c. C-5.1

s. 20 — referred to

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25

Generally — referred to

s. 92(1) — considered

s. 97(2.1) [en. 1990, c. 30, s. 35(c)] — referred to

s. 100.1(2) [en. 1990, c. 30, s. 40] — referred to

s. 100.1(3) [en. 1990, c. 30, s. 40] — considered

s. 100.1(5) [en. 1990, c. 30, s. 40] — referred to

s. 101 — referred to

Words and phrases considered:

Deference

Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law.

APPEAL by employee from judgment reported at *New Brunswick (Board of Management) v. Dunsmuir* (2006), 2006 CarswellNB 155, 2006 CarswellNB 156, 2006 NBCA 27, (sub nom. *Dunsmuir v. R.*) 2006 C.L.L.C. 220-030, 297 N.B.R. (2d) 151, 771 A.P.R. 151, 44 Admin. L.R. (4th) 92, 48 C.C.E.L. (3d) 196, 265 D.L.R. (4th) 609 (N.B. C.A.), dismissing employee's appeal from decision allowing employer's application for judicial review.

POURVOI formé par un employé à l'encontre d'un jugement publié à*New Brunswick (Board of Management) v. Dunsmuir* (2006), 2006 CarswellNB 155, 2006 CarswellNB 156, 2006 NBCA 27, (sub nom. *Dunsmuir v. R.*) 2006 C.L.L.C. 220-030, 297 N.B.R. (2d) 151, 771 A.P.R. 151, 44 Admin. L.R. (4th) 92, 48 C.C.E.L. (3d) 196, 265 D.L.R. (4th) 609 (N.B. C.A.), ayant rejeté l'appel interjeté par l'employé à l'encontre d'une décision ayant accueilli la demande de contrôle judiciaire de l'employeur.

***Bastarache, LeBel JJ.*:**

I. Introduction

1 This appeal calls on the Court to consider, once again, the troubling question of the approach to be taken in judicial review of decisions of administrative tribunals. The recent history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide real guidance for litigants, counsel, administrative decision makers or judicial review judges. The time has arrived for a reassessment of the question.

A. Facts

2 The appellant, David Dunsmuir, was employed by the Department of Justice for the Province of New Brunswick. His employment began on February 25, 2002, as a Legal Officer in the Fredericton Court Services Branch. The appellant was placed on an initial six-month probationary term. On March 14, 2002, by Order-in-Council, he was appointed to the

offices of Clerk of the Court of Queen's Bench, Trial Division, Administrator of the Court of Queen's Bench, Family Division, and Clerk of the Probate Court of New Brunswick, all for the Judicial District of Fredericton.

3 The employment relationship was not perfect. The appellant's probationary period was extended twice, to the maximum 12 months. At the end of each probationary period, the appellant was given a performance review. The first such review, which occurred in August 2002, identified four specific areas for improvement. The second review, three months later, cited the same four areas for development, but noted improvements in two. At the end of the third probationary period, the Regional Director of Court Services noted that the appellant had met all expectations and his employment was continued on a permanent basis.

4 The employer reprimanded the appellant on three separate occasions during the course of his employment. The first incident occurred in July 2002. The appellant had sent an email to the Chief Justice of the Court of Queen's Bench objecting to a request that had been made by the judge of the Fredericton Judicial District for the preparation of a practice directive. The Regional Director issued a reprimand letter to the appellant, explaining that the means he had used to raise his concerns were inappropriate and exhibited serious error in judgment. In the event that a similar concern arose in the future, he was directed to discuss the matter first with the Registrar or the Regional Director. The letter warned that failure to comply would lead to additional disciplinary measures and, if necessary, to dismissal.

5 A second disciplinary measure occurred when, in April 2004, it came to the attention of the Assistant Deputy Minister that the appellant was being advertised as a lecturer at legal seminars offered in the private sector. The appellant had inquired previously into the possibility of doing legal work outside his employment. In February 2004, the Assistant Deputy Minister had informed him that lawyers in the public service should not practise law in the private sector. A month later, the appellant wrote a letter to the Law Society of New Brunswick stating that his participation as a non-remunerated lecturer had been vetted by his employer, who had voiced no objection. On June 3, 2004, the Assistant Deputy Minister issued to the appellant written notice of a one-day suspension with pay regarding the incident. The letter also referred to issues regarding the appellant's work performance, including complaints from unnamed staff, lawyers and members of the public regarding his difficulties with timeliness and organization. This second letter concluded with the statement that "[f]uture occurrences of this nature and failure to develop more efficient organized work habits will result in disciplinary action up to and including dismissal".

6 Third, on July 21, 2004, the Regional Director wrote a formal letter of reprimand to the appellant regarding three alleged incidents relating to his job performance. This letter, too, concluded with a warning that the appellant's failure to improve his organization and timeliness would result in further disciplinary action up to and including dismissal. The

appellant responded to the letter by informing the Regional Director that he would be seeking legal advice and, until that time, would not meet with her to discuss the matter further.

7 A review of the appellant's work performance had been due in April 2004 but did not take place. The appellant met with the Regional Director on a couple of occasions to discuss backlogs and organizational problems. Complaints were relayed to her by staff but they were not documented and it is unknown how many complaints there had been. The Regional Director notified the appellant on August 11, 2004, that his performance review was overdue and would occur by August 20. A meeting had been arranged for August 19 between the appellant, the Regional Director, the Assistant Deputy Minister and counsel for the appellant and the employer. While preparing for that meeting, the Regional Director and the Assistant Deputy Minister concluded that the appellant was not right for the job. The scheduled meeting was cancelled and a termination notice was faxed to the appellant. A formal letter of termination from the Deputy Minister was delivered to the appellant's lawyer the next day. The letter terminated the appellant's employment with the Province of New Brunswick, effective December 31, 2004. It read, in relevant part:

> I regret to advise you that I have come to the conclusion that your particular skill set does not meet the needs of your employer in your current position, and that it is advisable to terminate your employment on reasonable notice, pursuant to section 20 of the *Civil Service Act*. You are accordingly hereby advised that your employment with the Province of New Brunswick will terminate on December 31, 2004. Cause for termination is not alleged.
>
> To aid in your search for other employment, you are not required to report to work during the notice period and your salary will be continued until the date indicated or for such shorter period as you require either to find a job with equivalent remuneration, or you commence self-employment.
>
> . . . . .
>
> In the circumstances, we would request that you avoid returning to the workplace until your departure has been announced to staff, and until you have returned your keys and government identification to your supervisor, Ms. Laundry as well as any other property of the employer still in your possession...

8 On February 3, 2005, the appellant was removed from his statutory offices by order of the Lieutenant-Governor in Council.

9 The appellant commenced the grievance process under s. 100.1 of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"; see Appendix), by letter to the Deputy Minister on September 1, 2004. That provision grants non-unionized employees of the provincial public service the right to file a grievance with respect to a "discharge,

suspension or a financial penalty" (s. 100.1(2)). The appellant asserted several grounds of complaint in his grievance letter, in particular, that the reasons for the employer's dissatisfaction were not made known; that he did not receive a reasonable opportunity to respond to the employer's concerns; that the employer's actions in terminating him were without notice, due process or procedural fairness; and that the length of the notice period was inadequate. The grievance was denied. The appellant then gave notice that he would refer the grievance to adjudication under the *PSLRA*. The adjudicator was selected by agreement of the parties and appointed by the Labour and Employment Board.

10 The adjudication hearing was convened and counsel for the appellant produced as evidence a volume of 169 documents. Counsel for the respondent objected to the inclusion of almost half of the documents. The objection was made on the ground that the documents were irrelevant since the appellant's dismissal was not disciplinary but rather was a termination on reasonable notice. The preliminary issue therefore arose of whether, where dismissal was with notice or pay in lieu thereof, the adjudicator was authorized to assess the reasons underlying the province's decision to terminate. Following his preliminary ruling on that issue, the adjudicator heard and decided the merits of the grievance.

B. Decisions of the Adjudicator

(1) Preliminary Ruling (January 10, 2005)

11 The adjudicator began his preliminary ruling by considering s. 97(2.1) of the *PSLRA*. He reasoned that because the appellant was not included in a bargaining unit and there was no collective agreement or arbitral award, the section ought to be interpreted to mean that where an adjudicator determines that an employee has been discharged for cause, the adjudicator may substitute another penalty for the discharge as seems just and reasonable in the circumstances. The adjudicator considered and relied on the decision of the New Brunswick Court of Appeal in *Dr. Everett Chalmers Hospital v. Mills* (1989), 102 N.B.R. (2d) 1 (N.B. C.A.).

12 Turning to s. 100.1 of the *PSLRA*, he noted the referential incorporation of s. 97 in s. 100.1(5). He stated that such incorporation "necessarily means that an adjudicator has jurisdiction to make the determination described in s. 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). The adjudicator noted that an employee to whom s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1 (see Appendix), applies may be discharged for cause, with reasonable notice or with pay in lieu of reasonable notice. He concluded by holding that an employer cannot avoid an inquiry into its real reasons for dismissing an employee by stating that cause is not alleged. Rather, a grieving employee is entitled to an adjudication as to whether a discharge purportedly with notice or pay in

lieu thereof was in fact for cause. He therefore held that he had jurisdiction to make such a determination.

(2) Ruling on the Merits (February 16, 2005)

13 In his decision on the merits, released shortly thereafter, the adjudicator found that the termination letter of August 19 effected termination with pay in lieu of notice. The employer did not allege cause. Inquiring into the reasons for dismissal the adjudicator was satisfied that, on his view of the evidence, the termination was not disciplinary. Rather, the decision to terminate was based on the employer's concerns about the appellant's work performance and his suitability for the positions he held.

14 The adjudicator then considered the appellant's claim that he was dismissed without procedural fairness in that the employer did not inform him of the reasons for its dissatisfaction and did not give him an opportunity to respond. The adjudicator placed some responsibility on the employer for cancelling the performance review scheduled for August 19. He also opined that the employer was not so much dissatisfied with the appellant's quality of work as with his lack of organization.

15 The adjudicator's decision relied on *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.), for the relevant legal principles regarding the right of "at pleasure" office holders to procedural fairness. As the appellant's employment was "hybrid in character" (para. 53) — he was both a Legal Officer under the *Civil Service Act* and, as Clerk, an office holder "at pleasure" — the adjudicator held that the appellant was entitled to procedural fairness in the employer's decision to terminate his employment. He declared that the termination was void *ab initio* and ordered the appellant reinstated as of August 19, 2004, the date of dismissal.

16 The adjudicator added that in the event that his reinstatement order was quashed on judicial review, he would find the appropriate notice period to be eight months.

C. Judicial History

(1) Court of Queen's Bench of New Brunswick (2005), 293 N.B.R. (2d) 5, 2005 NBQB 270 (N.B. Q.B.)

17 The Province of New Brunswick applied for judicial review of the adjudicator's decision on numerous grounds. In particular, it argued that the adjudicator had exceeded his jurisdiction in his preliminary ruling by holding that he was authorized to determine whether the termination was in fact for cause. The Province further argued that the adjudicator had acted incorrectly or unreasonably in deciding the procedural fairness issue. The application was heard by Rideout J.

18 The reviewing judge applied a pragmatic and functional analysis, considering the presence of a full privative clause in the *PSLRA*, the relative expertise of adjudicators appointed under the *PSLRA*, the purposes of ss. 97(2.1) and 100.1 of the *PSLRA* as well as s. 20 of the *Civil Service Act*, and the nature of the question as one of statutory interpretation. He concluded that the correctness standard of review applied and that the court need not show curial deference to the decision of an adjudicator regarding the interpretation of those statutory provisions.

19 Regarding the preliminary ruling, the reviewing judge noted that the appellant was employed "at pleasure" and fell under s. 20 of the *Civil Service Act*. In his view, the adjudicator had overlooked the effects of s. 20 and had mistakenly given ss. 97(2.1) and 100.1 of the *PSLRA* a substantive, rather than procedural, interpretation. Those sections are procedural in nature. They provide an employee with a right to grieve his or her dismissal and set out the steps that must be followed to pursue a grievance. The adjudicator is bound to apply the contractual provisions as they exist and has no authority to change those provisions. Thus, in cases in which s. 20 of the *Civil Service Act* applies, the adjudicator must apply the ordinary rules of contract. The reviewing judge held that the adjudicator had erred in removing the words "and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined" from s. 97(2.1). Those words limit s. 97(2.1) to employees who are not employed "at pleasure". In the view of the reviewing judge, the adjudicator did not have jurisdiction to inquire into the reasons for the termination. His authority was limited to determining whether the notice period was reasonable. Having found that the adjudicator had exceeded his jurisdiction, the reviewing judge quashed his preliminary ruling.

20 With respect to the adjudicator's award on the merits, the reviewing judge commented that some aspects of the decision are factual in nature and should be reviewed on a patent unreasonableness standard, while other aspects involve questions of mixed fact and law which are subject to a reasonableness *simpliciter* standard. The reviewing judge agreed with the Province that the adjudicator's reasons do not stand up to a "somewhat probing examination" (para. 76). The reviewing judge held that the adjudicator's award of reinstatement could not stand as he was not empowered by the *PSLRA* to make Lieutenant-Governor in Council appointments. In addition, by concluding that the decision was void *ab initio* owing to a lack of procedural fairness, the adjudicator failed to consider the doctrine of adequate alternative remedy. The appellant received procedural fairness by virtue of the grievance hearing before the adjudicator. The adjudicator had provisionally increased the notice period to eight months — that provided an adequate alternative remedy. Concluding that the adjudicator's decision did not stand up to review on a reasonableness *simpliciter* standard, the reviewing judge quashed the reinstatement order but upheld the adjudicator's provisional award of eight months' notice.

(2) Court of Appeal of New Brunswick (2006), 297 N.B.R. (2d) 151, 2006 NBCA 27 (N.B. C.A.)

21 The appellant appealed the decision of the reviewing judge. The Court of Appeal, Robertson J.A. writing, held that the proper standard with respect to the interpretation of the adjudicator's authority under the *PSLRA* was reasonableness *simpliciter* and that the reviewing judge had erred in adopting the correctness standard. The court reached that conclusion by proceeding through a pragmatic and functional analysis, placing particular emphasis on the presence of a full privative clause in the *PSLRA* and the relative expertise of an adjudicator in the labour relations and employment context. The court also relied on the decision of this Court in *A.U.P.E. v. Lethbridge Community College*, [2004] 1 S.C.R. 727, 2004 SCC 28 (S.C.C.). However, the court noted that the adjudicator's interpretation of the *Mills* decision warranted no deference and that "correctness is the proper review standard when it comes to the interpretation and application of caselaw" (para. 17).

22 Applying the reasonableness *simpliciter* standard, the court held that the adjudicator's decision was unreasonable. Robertson J.A. began by considering s. 20 of the *Civil Service Act* and noted that under the ordinary rules of contract, an employer holds the right to dismiss an employee with cause or with reasonable notice or with pay in lieu of notice. Section 20 of the *Civil Service Act* limits the Crown's common law right to dismiss its employees without cause or notice. Robertson J.A. reasoned that s. 97(2.1) of the *PSLRA* applies in principle to non-unionized employees, but that it is only where an employee has been discharged or disciplined *for cause* that an adjudicator may substitute such other penalty as seems just and reasonable in the circumstances. Where the employer elects to dismiss with notice or pay in lieu of notice, however, s. 97(2.1) does not apply. In such circumstances, the employee may only grieve the length of the notice period. The only exception is where the employee alleges that the decision to terminate was based on a prohibited ground of discrimination.

23 On the issue of procedural fairness, the court found that the appellant exercised his right to grieve, and thus a finding that the duty of fairness had been breached was without legal foundation. The court dismissed the appeal.

II. Issues

24 At issue, firstly is the approach to be taken in the judicial review of a decision of a particular adjudicative tribunal which was seized of a grievance filed by the appellant after his employment was terminated. This appeal gives us the opportunity to re-examine the foundations of judicial review and the standards of review applicable in various situations.

25 The second issue involves examining whether the appellant who held an office "at pleasure" in the civil service of New Brunswick, had the right to procedural fairness in the

employer's decision to terminate him. On this occasion, we will reassess the rule that has found formal expression in *Knight*.

26 The two types of judicial review, on the merits and on the process, are therefore engaged in this case. Our review of the system will therefore be comprehensive, which is preferable since a holistic approach is needed when considering fundamental principles.

III. Issue 1: Review of the Adjudicator's statutory interpretation determination

A. Judicial Review

27 As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

28 By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

29 Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220 (S.C.C.), at p. 234; also *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.), at para. 21.

30 In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. As noted by

Justice Thomas Cromwell, "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority; second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and defined according to the intent of the legislature in a contextual and purposeful way; third, legislative supremacy is affirmed and the court-centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" (T. A. Cromwell, "Appellate Review: Policy and Pragmatism", in *2006 Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice*, V-1, p. V-12). In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.

31 The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*British Columbia (Minister of Finance) v. Woodward Estate* (1972), [1973] S.C.R. 120 (S.C.C.), at p. 127). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. As noted by Beetz J. in *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048 (S.C.C.), [hereinafter *Bibeault*], at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". In short, judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits. As Laskin C.J. explained in *Crevier*, at pp. 237-38:

> Where ... questions of law have been specifically covered in a privative enactment, this Court, as in *Farrah*, has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the *British North America Act*, and s. 96 thereof. The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review.

See also D. J. Mullan, *Administrative Law* (2001), at p. 50.

32 Despite the clear, stable constitutional foundations of the system of judicial review, the operation of judicial review in Canada has been in a constant state of evolution over the years,

as courts have attempted to devise approaches to judicial review that are both theoretically sound and effective in practice. Despite efforts to refine and clarify it, the present system has proven to be difficult to implement. The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.

33 Although the instant appeal deals with the particular problem of judicial review of the decisions of an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system of judicial review as a whole. In the wake of *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (S.C.C.), *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)*, [2001] 2 S.C.R. 281, 2001 SCC 41 (S.C.C.), and *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 (S.C.C.), it has become apparent that the present system must be simplified. The comments of LeBel J. in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86 (S.C.C.), at paras. 190 and 195, questioning the applicability of the "pragmatic and functional approach" to the decisions and actions of all kinds of administrative actors, illustrated the need for change.

B. Reconsidering the Standards of Judicial Review

34 The current approach to judicial review involves three standards of review, which range from correctness, where no deference is shown, to patent unreasonableness, which is most deferential to the decision maker, the standard of reasonableness *simpliciter* lying, theoretically, in the middle. In our view, it is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. We conclude that there ought to be two standards of review — correctness and reasonableness.

35 The existing system of judicial review has its roots in several landmark decisions beginning in the late 1970s in which this Court developed the theory of substantive review to be applied to determinations of law, and determinations of fact and of mixed law and fact made by administrative tribunals. In *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.) ("*CUPE*"), Dickson J. introduced the idea that, depending on the legal and administrative contexts, a specialized administrative tribunal with particular expertise, which has been given the protection of a privative clause, if acting within its jurisdiction, could provide an interpretation of its enabling legislation that would be allowed to stand unless "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (p. 237). Prior to *CUPE*, judicial review followed the "preliminary question doctrine", which inquired into whether a tribunal had erred in determining the scope of its jurisdiction. By simply branding

an issue as "jurisdictional", courts could replace a decision of the tribunal with one they preferred, often at the expense of a legislative intention that the matter lie in the hands of the administrative tribunal. *CUPE* marked a significant turning point in the approach of courts to judicial review, most notably in Dickson J.'s warning that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233). Dickson J.'s policy of judicial respect for administrative decision making marked the beginning of the modern era of Canadian administrative law.

36 *CUPE* did not do away with correctness review altogether and in *Bibeault*, the Court affirmed that there are still questions on which a tribunal must be correct. As Beetz J. explained, "the jurisdiction conferred on administrative tribunals and other bodies created by statute is limited, and ... such a tribunal cannot by a misinterpretation of an enactment assume a power not given to it by the legislator" (p. 1086). *Bibeault* introduced the concept of a "pragmatic and functional analysis" to determine the jurisdiction of a tribunal, abandoning the "preliminary question" theory. In arriving at the appropriate standard of review, courts were to consider a number of factors including the wording of the provision conferring jurisdiction on the tribunal, the purpose of the enabling statute, the reason for the existence of the tribunal, the expertise of its members, and the nature of the problem (p. 1088). The new approach would put "renewed emphasis on the superintending and reforming function of the superior courts" (p. 1090). The "pragmatic and functional analysis", as it came to be known, was later expanded to determine the appropriate degree of deference in respect of various forms of administrative decision making.

37 In *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), a third standard of review was introduced into Canadian administrative law. The legislative context of that case, which provided a statutory right of appeal from the decision of a specialized tribunal, suggested that none of the existing standards was entirely satisfactory. As a result, the reasonableness *simpliciter* standard was introduced. It asks whether the tribunal's decision was reasonable. If so, the decision should stand; if not, it must fall. In *Southam*, Iacobucci J. described an unreasonable decision as one that "is not supported by any reasons that can stand up to a somewhat probing examination" (para. 56) and explained that the difference between patent unreasonableness and reasonableness *simpliciter* is the "immediacy" or "obviousness" of the defect in the tribunal's decision (para. 57). The defect will appear on the face of a patently unreasonable decision, but where the decision is merely unreasonable, it will take a searching review to find the defect.

38 The three standards of review have since remained in Canadian administrative law, the approach to determining the appropriate standard of review having been refined in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.).

39 The operation of three standards of review has not been without practical and theoretical difficulties, neither has it been free of criticism. One major problem lies in distinguishing between the patent unreasonableness standard and the reasonableness *simpliciter* standard. The difficulty in distinguishing between those standards contributes to the problem of choosing the right standard of review. An even greater problem lies in the application of the patent unreasonableness standard, which at times seems to require parties to accept an unreasonable decision.

40 The definitions of the patent unreasonableness standard that arise from the case law tend to focus on the magnitude of the defect and on the immediacy of the defect (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 (S.C.C.), at para. 78, *per* LeBel J.). Those two hallmarks of review under the patent unreasonableness standard have been used consistently in the jurisprudence to distinguish it from review under the standard of reasonableness *simpliciter*. As it had become clear that, after *Southam*, lower courts were struggling with the conceptual distinction between patent unreasonableness and reasonableness *simpliciter*, Iacobucci J., writing for the Court in *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.), attempted to bring some clarity to the issue. He explained the different operations of the two deferential standards as follows, at paras. 52-53:

> [A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason". ... A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.
>
> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam*, *supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

41 As discussed by LeBel J. at length in *Toronto (City) v. C.U.P.E., Local 79*, notwithstanding the increased clarity that *Ryan* brought to the issue and the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, a review of the cases reveals that any actual difference between them in terms of their operation appears to be illusory (see also the comments of Abella J. in *VIA Rail Canada Inc. v. Canadian Transportation Agency*, [2007] 1 S.C.R. 650 (S.C.C.), paras. 101-103). Indeed, even this Court divided when attempting to determine whether a particular decision was "patently unreasonable", although this should have been self-evident under the existing test

(see *C.U.P.E. v. Ontario (Minister of Labour)*). This result is explained by the fact that both standards are based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported. Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. As Mullan has explained:

> [T]o maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality.

See D. M. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 25.

42 Moreover, even if one could conceive of a situation in which a clearly or highly irrational decision were distinguishable from a merely irrational decision, it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear *enough*. It is also inconsistent with the rule of law to retain an irrational decision. As LeBel J. explained in his concurring reasons in *Toronto (City) v. C.U.P.E., Local 79*, at para. 108:

> In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness. ...

See also *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23 (S.C.C.), at paras. 40-41, *per* LeBel J.

C. Two Standards of Review

43 The Court has moved from a highly formalistic, artificial "jurisdiction" test that could easily be manipulated, to a highly contextual "functional" test that provides great flexibility but little real on-the-ground guidance, and offers too many standards of review. What is needed is a test that offers guidance, is not formalistic or artificial, and permits review where justice requires it, but not otherwise. A simpler test is needed.

(1) Defining the Concepts of Reasonabless and Correctness

44 As explained above, the patent unreasonableness standard was developed many years prior to the introduction of the reasonableness *simpliciter* standard in *Southam*. The intermediate standard was developed to respond to what the Court viewed as problems in the operation of judicial review in Canada, particularly the perceived all-or-nothing approach to deference, and in order to create a more finely calibrated system of judicial review (see also L. Sossin and C. M. Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007), 57 *U.T.L.J.* 581). However, the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review. Though we are of the view that the three-standard model is too difficult to apply to justify its retention, now, several years after *Southam*, we believe that it would be a step backwards to simply remove the reasonableness *simpliciter* standard and revert to pre-*Southam* law. As we see it, the problems that *Southam* attempted to remedy with the introduction of the intermediate standard are best addressed not by three standards of review, but by two standards, defined appropriately.

45 We therefore conclude that the two variants of reasonableness review should be collapsed into a single form of "reasonableness" review. The result is a system of judicial review comprising two standards — correctness and reasonableness. But the revised system cannot be expected to be simpler and more workable unless the concepts it employs are clearly defined.

46 What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?

47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned

with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

48 The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Mossop*, [*infra*], at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).

49 Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

50 As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if

not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

(2) Determining the Appropriate Standard of Review

51 Having dealt with the nature of the standards of review, we now turn our attention to the method for selecting the appropriate standard in individual cases. As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

52 The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.

53 Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.), at pp. 599-600; *Q.*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

54 Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *A.C.T.R.A. v. Canadian Broadcasting Corp.*, [1995] 1 S.C.R. 157 (S.C.C.), at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 (S.C.C.), at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E., Local 79*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan* (1974), [1975] 1 S.C.R. 517 (S.C.C.), where it was held that an administrative

decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

55 A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:

- A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.

- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).

- The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E., Local 79*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

56 If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

57 An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard (*Cartaway Resources Corp., Re*, [2004] 1 S.C.R. 672, 2004 SCC 26 (S.C.C.)). This simply means that the analysis required is already deemed to have been performed and need not be repeated.

58 For example, correctness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 (S.C.C.). Such questions, as well as other constitutional issues, are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution: *Martin v. Nova Scotia (Workers' Compensation Board)*, [2003] 2 S.C.R. 504, 2003 SCC 54 (S.C.C.); Mullan, *Administrative Law*, at p. 60.

59 Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19 (S.C.C.). In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

60 As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E., Local 79*, at para. 62, *per* LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in *Toronto (City) v. C.U.P.E., Local 79*, which dealt with complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process — issues that are at the heart of the administration of justice (see para. 15, *per* Arbour J.).

61 Questions regarding the jurisdictional lines between two or more competing specialized tribunals have also been subject to review on a correctness basis: *Regina Police Assn. v. Regina (City) Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 (S.C.C.); *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Québec (Procureure générale)*, [2004] 2 S.C.R. 185, 2004 SCC 39 (S.C.C.).

62 In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

63 The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.

64 The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

D. Application

65 Returning to the instant appeal and bearing in mind the foregoing discussion, we must determine the standard of review applicable to the adjudicator's interpretation of the *PSLRA*, in particular ss. 97(2.1) and 100.1, and s. 20 of the *Civil Service Act*. That standard of review must then be applied to the adjudicator's decision. In order to determine the applicable standard, we will now examine the factors relevant to the standard of review analysis.

(1) Proper Standard of Review on the Statutory Interpretation Issue

66 The specific question on this front is whether the combined effect of s. 97(2.1) and s. 100.1 of the *PSLRA* permits the adjudicator to inquire into the employer's reason for dismissing an employee with notice or pay in lieu of notice. This is a question of law. The question to be answered is therefore whether in light of the privative clause, the regime under which the adjudicator acted, and the nature of the question of law involved, a standard of correctness should apply.

67 The adjudicator was appointed and empowered under the *PSLRA*; s. 101(1) of that statute contains a full privative clause, stating in no uncertain terms that "every order, award, direction, decision, declaration or ruling of ... an adjudicator is final and shall not be questioned or reviewed in any court". Section 101(2) adds that "[n]o order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain ... an adjudicator in any of its or his proceedings." The inclusion of a full privative clause in the *PSLRA* gives rise to a strong indication that the reasonableness standard of review will apply.

68 The nature of the regime also favours the standard of reasonableness. This Court has often recognized the relative expertise of labour arbitrators in the interpretation of collective agreements, and counselled that the review of their decisions should be approached with deference: *CUPE*, at pp. 235-36; *Canada Safeway Ltd. v. R.W.D.S.U., Local 454*, [1998] 1 S.C.R. 1079 (S.C.C.), at para. 58; *Voice Construction*, at para. 22. The adjudicator in this case was, in fact, interpreting his enabling statute. Although the adjudicator was appointed on an *ad hoc* basis, he was selected by the mutual agreement of the parties and, at an institutional level, adjudicators acting under the *PSLRA* can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions. See *A.U.P.E. v. Lethbridge Community College*. This factor also suggests a reasonableness standard of review.

69 The legislative purpose confirms this view of the regime. The *PSLRA* establishes a time- and cost-effective method of resolving employment disputes. It provides an alternative to judicial determination. Section 100.1 of the *PSLRA* defines the adjudicator's powers in deciding a dispute, but it also provides remedial protection for employees who are not unionized. The remedial nature of s. 100.1 and its provision for timely and binding settlements of disputes also imply that a reasonableness review is appropriate.

70 Finally, the nature of the legal question at issue is not one that is of central importance to the legal system and outside the specialized expertise of the adjudicator. This also suggests that the standard of reasonableness should apply.

71 Considering the privative clause, the nature of the regime, and the nature of the question of law here at issue, we conclude that the appropriate standard is reasonableness. We must now apply that standard to the issue considered by the adjudicator in his preliminary ruling.

(2) Was the Adjudicator's Interpretation Unreasonable?

72 While we are required to give deference to the determination of the adjudicator, considering the decision in the preliminary ruling as a whole, we are unable to accept that it reaches the standard of reasonableness. The reasoning process of the adjudicator was deeply flawed. It relied on and led to a construction of the statute that fell outside the range of admissible statutory interpretations.

73 The adjudicator considered the New Brunswick Court of Appeal decision in *Dr. Everett Chalmers Hospital v. Mills* as well as amendments made to the *PSLRA* in 1990 (S.N.B. 1990, c. 30). Under the former version of the Act, an employee could grieve "with respect to ... disciplinary action resulting in discharge, suspension or a financial penalty" (s. 92(1)). The amended legislation grants the right to grieve "with respect to discharge, suspension or a financial penalty" (*PSLRA*, s. 100.1(2)). The adjudicator reasoned that the

referential incorporation of s. 97(2.1) in s. 100.1(5) "necessarily means that an adjudicator has jurisdiction to make the determination described in subsection 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). He further stated that an employer "cannot avoid an inquiry into its real reasons for a discharge, or exclude resort to subsection 97(2.1), *by simply stating that cause is not alleged*" (*ibid*, emphasis added). The adjudicator concluded that he could determine whether a discharge purportedly with notice or pay in lieu of notice was in reality for cause.

74 The interpretation of the law is always contextual. The law does not operate in a vacuum. The adjudicator was required to take into account the legal context in which he was to apply the law. The employment relationship between the parties in this case was governed by private law. The contractual terms of employment could not reasonably be ignored. That is made clear by s. 20 of the *Civil Service Act*. Under the ordinary rules of contract, the employer is entitled to discharge an employee for cause, with notice or with pay in lieu of notice. Where the employer chooses to exercise its right to discharge with reasonable notice or pay in lieu thereof, the employer is not required to assert cause for discharge. The grievance process cannot have the effect of changing the terms of the contract of employment. The respondent chose to exercise its right to terminate without alleging cause in this case. By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge where the employer had the right not to provide — or even have — such reasons, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and, thus, fatally flawed. For this reason, the decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law.

75 The decision of the adjudicator treated the appellant, a non-unionized employee, as a unionized employee. His interpretation of the *PSLRA*, which permits an adjudicator to inquire into the reasons for discharge where notice is given and, under s. 97(2.1), substitute a penalty that he or she determines just and reasonable in the circumstances, creates a requirement that the employer show cause before dismissal. There can be no justification for this; no reasonable interpretation can lead to that result. Section 100.1(5) incorporates s. 97(2.1) by reference into the determination of grievances brought by non-unionized employees. The employees subject to the *PSLRA* are usually unionized and the terms of their employment are determined by collective agreement; s. 97(2.1) explicitly refers to the collective agreement context. Section 100.1(5) referentially incorporates s. 97(2.1) *mutatis mutandis* into the non-collective agreement context so that non-unionized employees who are discharged *for cause and without notice* have the right to grieve the discharge and have the adjudicator substitute another penalty as seems just and reasonable in the circumstances. Therefore, the combined effect of s. 97(2.1) and s. 100.1 cannot, on any reasonable interpretation, remove the employer's right under contract law to discharge an employee with reasonable notice or pay in lieu of notice.

76 The interpretation of the adjudicator was simply unreasonable in the context of the legislative wording and the larger labour context in which it is embedded. It must be set aside. Nevertheless, it must be acknowledged that his interpretation of the *PSLRA* was ultimately inconsequential to the overall determination of the grievance, since the adjudicator made no finding as to whether the discharge was or was not, in fact, for cause. The decision on the merits, which resulted in an order that the appellant be reinstated, instead turned on the adjudicator's decision on a separate issue — whether the appellant was entitled to and, if so, received procedural fairness with regard to the employer's decision to terminate his employment. This issue is discrete and isolated from the statutory interpretation issue, and it raises very different considerations.

IV. Issue 2: Review of the Adjudicator's Procedural Fairness Determination

77 Procedural fairness has many faces. It is at issue where an administrative body may have prescribed rules of procedure that have been breached. It is also concerned with general principles involving the right to answer and defence where one's rights are affected. In this case, the appellant raised in his grievance letter that the reasons for the employer's dissatisfaction were not specified and that he did not have a reasonable opportunity to respond to the employer's concerns. There was, in his view, lack of due process and a breach of procedural fairness.

78 The procedural fairness issue was dealt with only briefly by the Court of Appeal. Robertson J.A. mentioned at the end of his reasons that a duty of fairness did not arise in this case since the appellant had been terminated with notice and had exercised his right to grieve. Before this Court, however, the appellant argued that he was entitled to procedural fairness as a result of this Court's jurisprudence. Although ultimately we do not agree with the appellant, his contention raises important issues that need to be examined more fully.

A. Duty of Fairness

79 Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight*, at p. 682; *Baker*, at para. 21; *Moreau-Bérubé c. Nouveau-Brunswick*, [2002] 1 S.C.R. 249, 2002 SCC 11 (S.C.C.), at paras. 74-75).

80 This case raises the issue of the extent to which a duty of fairness applies to the dismissal of a public employee pursuant to a contract of employment. The grievance adjudicator concluded that the appellant had been denied procedural fairness because he had not been

granted a hearing by the employer before being dismissed with four months' pay in lieu of notice. This conclusion was said to flow from this Court's decision in *Knight*, where it was held that the holder of an office "at pleasure" was entitled to be given the reasons for his or her dismissal and an opportunity to be heard before being dismissed (p. 683).

81 We are of the view that the principles established in *Knight* relating to the applicability of a duty of fairness in the context of public employment merit reconsideration. While the majority opinion in *Knight* properly recognized the important place of a general duty of fairness in administrative law, in our opinion, it incorrectly analyzed the effects of a contract of employment on such a duty. The majority in *Knight* proceeded on the premise that a duty of fairness based on public law applied unless expressly excluded by the employment contract or the statute (p. 681), without consideration of the terms of the contract with regard to fairness issues. It also upheld the distinction between office holders and contractual employees for procedural fairness purposes (pp. 670-76). In our view, what matters is the nature of the employment relationship between the public employee and the public employer. Where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. What *Knight* truly stands for is the principle that there is always a recourse available where the employee is an office holder and the applicable law leaves him or her without any protection whatsoever when dismissed.

82 This conclusion does not detract from the general duty of fairness owed by administrative decision makers. Rather it acknowledges that in the specific context of dismissal from public employment, disputes should be viewed through the lens of contract law rather than public law.

83 In order to understand why a reconsideration of *Knight* is warranted, it is necessary to review the development of the duty of fairness in Canadian administrative law. As we shall see, its development in the public employment context was intimately related to the distinction between public office holders and contractual employees, a distinction which, in our view, has become increasingly difficult to maintain both in principle and in practice.

(1) The Preliminary Issue of Jurisdiction

84 Before dealing with the scope of the duty of fairness in this case, a word should be said about the respondent's preliminary objection to the jurisdiction of the adjudicator under the *PSLRA* to consider procedural fairness. The respondent argues that allowing adjudicators to consider procedural fairness risks granting them the inherent powers of a court. We disagree. We can see nothing problematic with a grievance adjudicator considering a public law duty of fairness issue where such a duty exists. It falls squarely within the adjudicator's task to resolve a grievance. However, as will be explained below, the proper approach is to first

identify the nature of the employment relationship and the applicable law. Where, as here, the relationship is contractual, a public law duty of fairness is not engaged and therefore should play no role in resolving the grievance.

(2) The Development of the Duty of Fairness in Canadian Public Law

85 In Canada, the modern concept of procedural fairness in administrative law was inspired by the House of Lords' landmark decision in *Ridge v. Baldwin*, [1963] 2 All E.R. 66 (U.K. H.L.), a case which involved the summary dismissal of the chief constable of Brighton. The House of Lords declared the chief constable's dismissal a nullity on the grounds that the administrative body which had dismissed him had failed to provide the reasons for his dismissal or to accord him an opportunity to be heard in violation of the rules of natural justice. Central to the reasoning in the case was Lord Reid's distinction between (i) master-servant relationships (i.e. contractual employment), (ii) offices held "at pleasure", and (iii) offices where there must be cause for dismissal, which included the chief constable's position. According to Lord Reid, only the last category of persons was entitled to procedural fairness in relation to their dismissal since both contractual employees and office holders employed "at pleasure" could be dismissed without reason (p. 72). As the authors Wade and Forsyth note that, after a period of retreat from imposing procedural fairness requirements on administrative decision makers, *Ridge v. Baldwin* "marked an important change of judicial policy, indicating that natural justice was restored to favour and would be applied on a wide basis" (W. Wade and C. Forsyth, *Administrative Law* (8th ed. 2000), at p. 438).

86 The principles established by *Ridge v. Baldwin* were followed by this Court in *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police* (1978), [1979] 1 S.C.R. 311 (S.C.C.). *Nicholson*, like its U.K. predecessor, marked the return to a less rigid approach to natural justice in Canada (see Brown and Evans, at pp. 7-5 to 7-9). *Nicholson* concerned the summary dismissal of a probationary police officer by a regional board of police commissioners. Laskin C.J., for the majority, at p. 328, declared the dismissal void on the ground that the officer fell into Lord Reid's third category and was therefore entitled to the same procedural protections as in *Ridge v. Baldwin*.

87 Although *Ridge v. Baldwin* and *Nicholson* were concerned with procedural fairness in the context of the dismissal of public office holders, the concept of fairness was quickly extended to other types of administrative decisions (see e.g. *Martineau v. Matsqui Institution (No. 2)* (1979), [1980] 1 S.C.R. 602 (S.C.C.); *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.); *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.)). In *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.), Le Dain J. stated that the duty of fairness was a general principle of law applicable to all public authorities:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual. ... [p. 653]
>
> (See also *Baker*, at para. 20.)

88 In *Knight*, the Court relied on the statement of Le Dain J. in *Cardinal v. Kent Institution* that the existence of a general duty to act fairly will depend on "(i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights" (*Knight*, at p. 669).

89 The dispute in *Knight* centred on whether a board of education had failed to accord procedural fairness when it dismissed a director of education with three months' notice pursuant to his contract of employment. The main issue was whether the director's employment relationship with the school board was one that attracted a public law duty of fairness. L'Heureux-Dubé J., for the majority, held that it did attract such a duty on the ground that the director's position had a "strong 'statutory flavour'" and could thus be qualified as a public office (p. 672). In doing so, she specifically recognized that, contrary to Lord Reid's holding in *Ridge v. Baldwin*, holders of an office "at pleasure", were also entitled to procedural fairness before being dismissed (pp. 673-74). The fact that the director's written contract of employment specifically provided that he could be dismissed with three months' notice was held not to be enough to displace a public law duty to act fairly (p. 681).

90 From these foundational cases, procedural fairness has grown to become a central principle of Canadian administrative law. Its overarching purpose is not difficult to discern: administrative decision makers, in the exercise of public powers, should act fairly in coming to decisions that affect the interests of individuals. In other words, "[t]he observance of fair procedures is central to the notion of the 'just' exercise of power" (Brown and Evans, at p. 7-3). What is less clear, however, is whether this purpose is served by imposing public law procedural fairness requirements on public bodies in the exercise of their contractual rights as employers.

(3) Procedural Fairness in the Public Employment Context

91 *Ridge v. Baldwin* and *Nicholson* established that a public employee's right to procedural fairness depended on his or her status as an office holder. While *Knight* extended a duty of fairness to office holders during pleasure, it nevertheless upheld the distinction between office holders and contractual employees as an important criterion in establishing whether a duty of fairness was owed. Courts have continued to rely on this distinction, either extending or denying procedural protections depending on the characterization of the public employee's

legal status as an office holder or contractual employee (see e.g. *Reglin v. Creston (Town)* (2004), 34 C.C.E.L. (3d) 123, 2004 BCSC 790 (B.C. S.C.); *Gismondi v. Toronto (City)* (2003), 64 O.R. (3d) 688 (Ont. C.A.); *Seshia v. Health Sciences Centre* (2001), 160 Man. R. (2d) 41, 2001 MBCA 151 (Man. C.A.); *Rosen v. Saskatoon District Health Board* (2001), 202 D.L.R. (4th) 35, 2001 SKCA 83 (Sask. C.A.); *Hanis v. Teevan* (1998), 111 O.A.C. 91 (Ont. C.A.); *Gerrard v. Sackville (Town)* (1992), 124 N.B.R. (2d) 70 (N.B. C.A.)).

92 In practice, a clear distinction between office holders and contractual employees has been difficult to maintain:

> Although the law makes a sharp distinction between office and service in theory, in practice it may be difficult to tell which is which. For tax purposes "office" has long been defined as a "subsisting, permanent substantive position which has an existence independent of the person who fills it", but for the purposes of natural justice the test may not be the same. Nor need an office necessarily be statutory, although nearly all public offices of importance in administrative law are statutory. A statutory public authority may have many employees who are in law merely its servants, and others of higher grades who are office-holders.
>
> (Wade and Forsyth, at pp. 532-33)

93 Lord Wilberforce noted that attempting to separate office holders from contractual employees

> involves the risk of a compartmental approach which, although convenient as a solvent, may lead to narrower distinctions than are appropriate to the broader issues of administrative law. A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of rules of natural justice, according to the master and servant test, looks illogical and even bizarre.
>
> (*Malloch v. Aberdeen Corp.*, [1971] 2 All E.R. 1278 (U.K. H.L.), at p. 1294)

94 There is no reason to think that the distinction has been easier to apply in Canada. In *Knight*, as has been noted, the majority judgment relied on whether the public employee's position had a "strong 'statutory flavour'" (p. 672), but as Brown and Evans observe, "there is no simple test for determining whether there is a sufficiently strong 'statutory flavour' to a job for it to be classified as an 'office'" (p. 7-19). This has led to uncertainty as to whether procedural fairness attaches to particular positions. For instance, there are conflicting decisions on whether the position of a "middle manager" in a municipality is sufficiently important to attract a duty of fairness (compare *Gismondi*, at para. 53, and *Hughes v. Moncton (City)* (1990), 111 N.B.R. (2d) 184 (N.B. Q.B.) aff'd (1991), 118 N.B.R. (2d) 306 (N.B. C.A.). Similarly, physicians working in the public health system may or may

not be entitled to a duty of fairness (compare *Seshia* and *Rosen v. Saskatoon District Health Board*, [2000] 4 W.W.R. 606, 2000 SKQB 40 (Sask. Q.B.)).

95 Further complicating the distinction is the fact that public employment is for the most part now viewed as a regular contractual employment relationship. The traditional position at common law was that public servants were literally "servants of the Crown" and could therefore be dismissed at will. However, it is now recognized that most public employees are employed on a contractual basis: *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 (S.C.C.).

96 *Wells* concerned the dismissal without compensation of a public office holder whose position had been abolished by statute. The Court held that, while Wells' position was created by statute, his employment relationship with the Crown was contractual and therefore he was entitled to be compensated for breach of contract according to ordinary private law principles. Indeed, *Wells* recognized that most civil servants and public officers are employed under contracts of employment, either as members of unions bound by collective agreements or as non-unionized employees under individual contracts of employment (paras. 20-21 and 29-32). Only certain officers, like ministers of the Crown and "others who fulfill constitutionally defined state roles", do not have a contractual relationship with the Crown, since the terms of their positions cannot be modified by agreement (*Wells*, at paras. 29-32).

97 The effect of *Wells*, as Professors Hogg and Monahan note, is that

> [t]he government's common law relationship with its employees will now be governed, for the most part, by the general law of contract, in the same way as private employment relationships. This does not mean that governments cannot provide for a right to terminate employment contracts at pleasure. However, if the government wishes to have such a right, it must either contract for it or make provision (expressly or by necessary implication) by way of statute.
>
> (P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000, at p. 240)

The important point for our purposes is that *Wells* confirmed that most public office holders have a contractual employment relationship. Of course, office holders' positions will also often be governed by statute and regulations, but the essence of the employment relationship is still contractual. In this context, attempting to make a clear distinction between office holders and contractual employees for the purposes of procedural fairness becomes even more difficult.

98 If the distinction has become difficult to maintain in practice, it is also increasingly hard to justify in principle. There would appear to be three main reasons for distinguishing between office holders and contractual employees and for extending procedural fairness protections only to the former, all of which, in our view, are problematic.

99 First, historically, offices were viewed as a form of property, and thus could be recovered by the office holder who was removed contrary to the principles of natural justice. Employees who were dismissed in breach of their contract, however, could only sue for damages, since specific performance is not generally available for contracts for personal service (Wade and Forsyth, at pp. 531-32). This conception of public office has long since faded from our law: public offices are no longer treated as a form of private property.

100 A second and more persuasive reason for the distinction is that dismissal from public office involves the exercise of delegated statutory power and should therefore be subject to public law controls like any other administrative decision (*Knight*, at p. 675; *Malloch*, at p. 1293, *per* Lord Wilberforce). In contrast, the dismissal of a contractual employee only implicates a public authority's private law rights as an employer.

101 A third reason is that, unlike contractual employees, office holders did not typically benefit from contractual rights protecting them from summary discharge. This was true of the public office holders in *Ridge v. Baldwin* and *Nicholson*. Indeed, in both cases the statutory language purported to authorize dismissal without notice. The holders of an office "at pleasure" were in an even more tenuous position since by definition they could be dismissed without notice *and* without reason (*Nicholson*, at p. 323; *Black's Law Dictionary* (8th ed. (2004), p. 1192 "pleasure appointment"). Because of this relative insecurity it was seen to be desirable to impose minimal procedural requirements in order to ensure that office holders were not deprived of their positions arbitrarily (*Nicholson*, at pp. 322-23; *Knight*, at pp. 674-75; Wade and Forsyth, at pp. 536-37).

102 In our view, the existence of a contract of employment, not the public employee's status as an office holder, is the crucial consideration. Where a public office holder is employed under a contract of employment the justifications for imposing a public law duty of fairness with respect to his or her dismissal lose much of their force.

103 Where the employment relationship is contractual, it becomes difficult to see how a public employer is acting any differently in dismissing a public office holder and a contractual employee. In both cases, it would seem that the public employer is merely exercising its private law rights as an employer. For instance, in *Knight*, the director's position was terminated by a resolution passed by the board of education pursuant to statute, but it was done in accordance with the contract of employment, which provided for dismissal on three months' notice. Similarly, the appellant in this case was dismissed pursuant to s. 20 of the New Brunswick *Civil Service Act*, but that section provides that the ordinary rules of contract govern dismissal. He could therefore only be dismissed for just cause or on reasonable notice, and any failure to do so would give rise to a right to damages. In seeking to end the employment relationship with four months' pay in lieu of notice, the respondent was acting

no differently than any other employer at common law. In *Wells*, Major J. noted that public employment had all of the features of a contractual relationship:

> A common-sense view of what it means to work for the government suggests that these relationships have all the hallmarks of contract. There are negotiations leading to agreement and employment. This gives rise to enforceable obligations on both sides. The Crown is acting much as an ordinary citizen would, engaging in mutually beneficial commercial relations with individual and corporate actors. Although the Crown may have statutory guidelines, the result is still a contract of employment.
>
> [Emphasis added; para. 22.]

If the Crown is acting as any other private actor would in hiring its employees, then it follows that the dismissal of its employees should be viewed in the same way.

104 Furthermore, while public law is rightly concerned with preventing the arbitrary exercise of delegated powers, the good faith exercise of the contractual rights of an employer, such as the right to end the employment relationship on reasonable notice, cannot be qualified as arbitrary. Where the terms of the employment contract were explicitly agreed to, it will be assumed that procedural fairness was dealt with by the parties (see, for example, in the context of collective agreements: *Southeast Kootenay School District No. 5 v. B.C.T.F.* (2000), 94 L.A.C. (4th) 56 (B.C. Arb. Bd.)). If, however, the contract of employment is silent, the fundamental terms will be supplied by the common law or the civil law, in which case dismissal may only be for just cause or on reasonable notice.

105 In the context of this appeal, it must be emphasized that dismissal with reasonable notice is not unfair *per se*. An employer's right to terminate the employment relationship with due notice is simply the counterpart to the employee's right to quit with due notice (G. England, *Employment Law in Canada* (4th ed. (loose-leaf)), at para. 13.3). It is a well-established principle of the common law that, unless otherwise provided, both parties to an employment contract may end the relationship without alleging cause so long as they provide adequate notice. An employer's right to terminate on reasonable notice must be exercised within the framework of an employer's general obligations of good faith and fair dealing: *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), at para. 95. But the good faith exercise of a common law contractual right to dismiss with notice does not give rise to concerns about the illegitimate exercise of public power. Moreover, as will be discussed below, where public employers do act in bad faith or engage in unfair dealing, the private law provides a more appropriate form of relief and there is no reason that they should be treated differently than private sector employers who engage in similar conduct.

106 Of course, a public authority must abide by any statutory restrictions on the exercise of its discretion as an employer, regardless of the terms of an employment contract, and failure

to do so may give rise to a public law remedy. A public authority cannot contract out of its statutory duties. But where a dismissal decision is properly within the public authority's powers and is taken pursuant to a contract of employment, there is no compelling public law purpose for imposing a duty of fairness.

107 Nor is the protection of office holders a justification for imposing a duty of fairness when the employee is protected from wrongful dismissal by contract. The appellant's situation provides a good illustration of why this is so. As an office holder, the appellant was employed "at pleasure", and could therefore be terminated without notice or reason (*Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 20). However, he was also a civil servant and, pursuant to s. 20 of the *Civil Service Act*, his dismissal was governed by the ordinary rules of contract. If his employer had dismissed him without notice and without cause he would have been entitled to claim damages for breach of contract. Even if he was dismissed with notice, it was open to him to challenge the length of notice or amount of pay in lieu of notice given. On the facts, the respondent gave the appellant four months' worth of pay in lieu of notice, which he was successful in having increased to eight months before the grievance adjudicator.

108 It is true that the remedy of reinstatement is not available for breach of contract at common law. In this regard, it might be argued that contractual remedies, on their own, offer insufficient protection to office holders (see *de Smith, Woolf & Jowell: Judicial Review of Administrative Action* (5th ed. 1995), at p. 187). However, it must be kept in mind that breach of a public law duty of fairness also does not lead to full reinstatement. The effect of a breach of procedural fairness is to render the dismissal decision void *ab initio* (*Ridge v. Baldwin*, at p. 81). Accordingly, the employment is deemed to have never ceased and the office holder is entitled to unpaid wages and benefits from the date of the dismissal to the date of judgment (see England, at para. 17.224). However, an employer is free to follow the correct procedure and dismiss the office holder again. A breach of the duty of fairness simply requires that the dismissal decision be retaken. It therefore is incorrect to equate it to reinstatement (see *Malloch*, at p. 1284).

109 In addition, a public law remedy can lead to unfairness. The amount of unpaid wages and benefits an office holder is entitled to will be a function of the length of time the judicial process has taken to wend its way to a final resolution rather than criteria related to the employee's situation. Furthermore, in principle, there is no duty to mitigate since unpaid wages are not technically damages. As a result, an employee may recoup much more than he or she actually lost (see England, at para. 17.224).

110 In contrast, the private law offers a more principled and fair remedy. The length of notice or amount of pay in lieu of notice an employee is entitled to depends on a number of factors including length of service, age, experience and the availability of alternative employment (see *Wallace*, at paras. 81 ff.). The notice period may be increased

if it is established that the employer acted in bad faith or engaged in unfair dealing when acting to dismiss the employee (*Wallace*, at para. 95). These considerations aim at ensuring that dismissed employees are afforded some measure of protection while looking for new employment.

111 It is important to note as well that the appellant, as a public employee employed under a contract of employment, also had access to all of the same statutory and common law protections that surround private sector employment. He was protected from dismissal on the basis of a prohibited ground of discrimination under the *Human Rights Act*, R.S.N.B. 1973, c. H-11. His employer was bound to respect the norms laid down by the *Employment Standards Act*, S.N.B. 1982, c. E-7.2. As has already been mentioned, if his dismissal had been in bad faith or he had been subject to unfair dealing, it would have been open to him to argue for an extension of the notice period pursuant to the principles laid down in *Wallace*. In short, the appellant was not without legal protections or remedies in the face of his dismissal.

(4) The Proper Approach to the Dismissal of Public Employees

112 In our view, the distinction between office holder and contractual employee for the purposes of a public law duty of fairness is problematic and should be done away with. The distinction is difficult to apply in practice and does not correspond with the justifications for imposing public law procedural fairness requirements. What is important in assessing the actions of a public employer in relation to its employees is the nature of the employment relationship. Where the relationship is contractual, it should be viewed as any other private law employment relationship regardless of an employee's status as an office holder.

113 The starting point, therefore, in any analysis, should be to determine the nature of the employment relationship with the public authority. Following *Wells*, it is assumed that most public employment relationships are contractual. Where this is the case, disputes relating to dismissal should be resolved according to the express or implied terms of the contract of employment and any applicable statutes and regulations, without regard for whether the employee is an office holder. A public authority which dismisses an employee pursuant to a contract of employment should not be subject to any additional public law duty of fairness. Where the dismissal results in a breach of contract, the public employee will have access to ordinary contractual remedies.

114 The principles expressed in *Knight* in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that the majority decision in *Knight* ignored the important effect of a contract of employment, it should not be followed. Where a public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law, not in public law.

115 The dismissal of a public employee should therefore generally be viewed as a typical employment law dispute. However, there may be occasions where a public law duty of fairness will still apply. We can envision two such situations at present. The first occurs where a public employee is not, in fact, protected by a contract of employment. This will be the case with judges, ministers of the Crown and others who "fulfill constitutionally defined state roles" (*Wells*, at para. 31). It may also be that the terms of appointment of some public office holders expressly provide for summary dismissal or, at the very least, are silent on the matter, in which case the office holders may be deemed to hold office "at pleasure" (see e.g. *New Brunswick Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 20; *Interpretation Act*, R.S.C. 1985, c. I-21, s. 23(1)). Because an employee in this situation is truly subject to the will of the Crown, procedural fairness is required to ensure that public power is not exercised capriciously.

116 A second situation occurs when a duty of fairness flows by necessary implication from a statutory power governing the employment relationship. In *Malloch*, the applicable statute provided that dismissal of a teacher could only take place if the teacher was given three weeks' notice of the motion to dismiss. The House of Lords found that this necessarily implied a right for the teacher to make representations at the meeting where the dismissal motion was being considered. Otherwise, there would have been little reason for Parliament to have provided for the notice procedure in the first place (p. 1282). Whether and what type of procedural requirements result from a particular statutory power will of course depend on the specific wording at issue and will vary with the context (*Knight*, at p. 682).

B. Conclusion

117 In this case, the appellant was a contractual employee of the respondent in addition to being a public office holder. Section 20 of the *Civil Service Act* provided that, as a civil servant, he could only be dismissed in accordance with the ordinary rules of contract. In these circumstances it was unnecessary to consider any public law duty of procedural fairness. The respondent was fully within its rights to dismiss the appellant with pay in lieu of notice without affording him a hearing. The respondent dismissed the appellant with four months' pay in lieu of notice. The appellant was successful in increasing this amount to eight months. The appellant was protected by contract and was able to obtain contractual remedies in relation to his dismissal. By imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of the appellant, the adjudicator erred in his application of the duty of fairness and his decision was therefore correctly struck down by the Court of Queen's Bench.

V. Disposition

118 We would dismiss the appeal. There will be no order for costs in this Court as the respondent is not requesting them.

***Binnie J.* (concurring):**

119 I agree with my colleagues that the appellant's former employment relationship with the respondent is governed by contract. The respondent chose to exercise its right to terminate the employment without alleging cause. The adjudicator adopted an unreasonable interpretation of s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, and of ss. 97(2.1) and 100.1 of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25. The appellant was a non-unionized employee whose job was terminated in accordance with contract law. Public law principles of procedural fairness were not applicable in the circumstances. These conclusions are enough to dispose of the appeal.

120 However, my colleagues Bastarache and LeBel JJ. are embarked on a more ambitious mission, stating that:

> Although the instant appeal deals with the particular problem of judicial review of the decisions of an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system as a whole.
>
> . . . . .
>
> The time has arrived to reexamine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable. [Emphasis added; paras. 33 and 32.]

121 The need for such a re-examination is widely recognized, but in the end my colleagues' reasons for judgment do not deal with the "system as a whole". They focus on administrative tribunals. In that context, they reduce the applicable standards of review from three to two ("correctness" and "reasonableness"), but retain the pragmatic and functional analysis, although now it is to be called "the standard of review analysis" (para. 63). A broader reappraisal is called for. Changing the name of the old pragmatic and functional test represents a limited advance, but as the poet says:

> What's in a name? that which we call a rose
>
> By any other name would smell as sweet;
>
> (*Romeo and Juliet*, Act II, Scene i)

122 I am emboldened by my colleagues' insistence that "a holistic approach is needed when considering fundamental principles" (para. 26) to express the following views. Judicial review is an idea that has lately become unduly burdened with law office metaphysics. We are concerned with substance not nomenclature. The words themselves are unobjectionable. The dreaded reference to "functional" can simply be taken to mean that generally speaking

courts have the last word on what *they* consider the correct decision on legal matters (because deciding legal issues is their "function"), while administrators should generally have the last word within *their* function, which is to decide administrative matters. The word "pragmatic" not only signals a distaste for formalism but recognizes that a conceptually tidy division of functions has to be tempered by practical considerations: for example a labour board is better placed than the courts to interpret the intricacies of provisions in a labour statute governing replacement of union workers; see e.g., *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.).

123 Parliament or a provincial legislature is often well advised to allocate an administrative decision to someone other than a judge. The judge is on the outside of the administration looking in. The legislators are entitled to put their trust in the viewpoint of the designated decision maker (particularly as to what constitutes a reasonable outcome), not only in the case of the administrative tribunals of principal concern to my colleagues but (taking a "holistic approach") also in the case of a minister, a board, a public servant, a commission, an elected council or other administrative bodies and statutory decision makers. In the absence of a full statutory right of appeal, the court ought generally to respect the exercise of the administrative discretion, particularly in the face of a privative clause.

124 On the other hand, a court is right to insist that *its* view of the correct opinion (i.e. the "correctness" standard of review) is accepted on questions concerning the Constitution, the common law, and the interpretation of a statute other than the administrator's enabling statute (the "home statute") or a rule or statute closely connected with it; see generally D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), at para. 14: 2210.

125 Thus the law (or, more grandly, the "rule of law") sets the boundaries of potential administrative action. It is sometimes said by judges that an administrator acting within his or her discretion "has the right to be wrong". This reflects an unduly court-centred view of the universe. A disagreement between the court and an administrator does not necessarily mean that the administrator is wrong.

A. Limits on the Allocation of Decision Making

126 It should not be difficult in the course of judicial review to identify legal questions requiring disposition by a judge. There are three basic legal limits on the allocation of administrative discretion.

127 Firstly, the Constitution restricts the legislator's ability to allocate issues to administrative bodies which s. 96 of the *Constitution Act, 1867* has allocated to the courts. The logic of the constitutional limitation is obvious. If the limitation did not exist, the government could transfer the work of the courts to administrative bodies that are not independent of

the executive and by statute immunize the decisions of these bodies from effective judicial review. The country would still possess an independent judiciary, but the courts would not be available to citizens whose rights or interests are trapped in the administration.

128 Secondly, administrative action must be founded on statutory or prerogative (i.e. common law) powers. This too is a simple idea. No one can exercise a power they do not possess. Whether or not the power (or jurisdiction) exists is a question of law for the courts to determine, just as it is for the courts (not the administrators) to have the final word on questions of general law that may be relevant to the resolution of an administrative issue. The instances where this Court has deferred to an administrator's conclusion of law *outside* his or her home statute, or a statute "intimately" connected thereto, are exceptional. We should say so. Instead, my colleagues say the court's view of the law will prevail

> where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise". [para. 60]

It is, with respect, a distraction to unleash a debate in the reviewing judge's courtroom about whether or not a particular question of law is "of central importance to the legal system as a whole". It should be sufficient to frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker (as in the labour board example). Apart from that exception, we should prefer clarity to needless complexity and hold that the last word on questions of general law should be left to judges.

129 Thirdly, a fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process. Nor is such an unjust intent to be attributed easily to legislators. *Hansard* is full of expressions of concern by Ministers and Members of Parliament regarding the fairness of proposed legislative provisions. There is a dated *hauteur* about judicial pronouncements such as that the "justice of the common law will supply the omission of the legislature" (*Cooper v. Wandsworth Board of Works* (1863), 14 C.B.N.S. 180, 143 E.R. 414 (Eng. C.P.), at p. 420). Generally speaking, legislators and judges in this country are working with a common set of basic legal and constitutional values. They share a belief in the rule of law. Constitutional considerations aside, however, statutory protections can nevertheless be repealed and common law protections can be modified by statute, as was demonstrated in

Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch), [2001] 2 S.C.R. 781, 2001 SCC 52 (S.C.C).

B. Reasonableness of Outcome

130 At this point, judicial review shifts gears. When the applicant for judicial review challenges the substantive *outcome* of an administrative action, the judge is invited to cross the line into second-guessing matters that lie within the function of the administrator. This is controversial because it is not immediately obvious why a judge's view of the reasonableness of an administrative policy or the exercise of an administrative discretion should be preferred to that of the administrator to whom Parliament or a legislature has allocated the decision, unless there is a full statutory right of appeal to the courts, or it is otherwise indicated in the conferring legislation that a "correctness" standard is intended.

131 In *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048 (S.C.C.), Beetz J. adopted the view that "[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation" (p. 1087(emphasis in original deleted)). Judicial intervention in administrative decisions on grounds of substance (in the absence of a constitutional challenge) has been based on presumed legislative intent in a line of cases from *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1947] 2 All E.R. 680 (Eng. C.A.) ("you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority" (p. 683)) to *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.* ("was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation...?" (p. 237)). More recent examples are *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) (para. 53), and *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)*, [2001] 2 S.C.R. 281, 2001 SCC 41 (S.C.C.), (paras. 60-61). Judicial review proceeds on the justified presumption that legislators do not intend results that depart from *reasonable* standards.

C. The Need to Reappraise the Approach to Judicial Review

132 The present difficulty, it seems, does not lie in the component parts of judicial review, most of which are well entrenched in decades of case law, but in the current methodology for putting those component parts into action. There is afoot in the legal profession a desire for clearer guidance than is provided by lists of principles, factors and spectrums. It must be recognized, of course, that complexity is inherent in all legal principles that must address the vast range of administrative decision making.

The objection is that our present "pragmatic and functional" approach is more complicated than is required by the subject matter.

133 People who feel victimized or unjustly dealt with by the apparatus of government, and who have no recourse to an administrative appeal, should have access to an independent judge through a procedure that is quick and relatively inexpensive. Like much litigation these days, however, judicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied. The disposition of the case may well *turn* on the choice of standard of review. If litigants do take the plunge, they may find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is the pragmatic and functional test. Every hour of a lawyer's preparation and court time devoted to unproductive "lawyer's talk" poses a significant cost to the applicant. If the challenge is unsuccessful, the unhappy applicant may also face a substantial bill of costs from the successful government agency. A victory before the reviewing court may be overturned on appeal because the wrong "standard of review" was selected. A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome. Thus, in my view, the law of judicial review should be pruned of some of its unduly subtle, unproductive, or esoteric features.

D. Standards of Review

134 My colleagues conclude that three standards of review should be reduced to two standards of review. I agree that this simplification will avoid some of the arcane debates about the point at which "unreasonableness" becomes "patent unreasonableness". However, in my view the repercussions of their position go well beyond administrative tribunals. My colleagues conclude, and I agree:

> Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. [para. 41]

More broadly, they declare that "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" (para. 44), and "any actual difference between them in terms of their operation appears to be illusory" (para. 41). A test which is incoherent when applied to administrative tribunals does not gain in coherence or logic when applied to other administrative decision makers such as mid-level bureaucrats or, for that matter, Ministers. If logic and language cannot capture the distinction in one context, it must equally be deficient elsewhere in the field of judicial review. I therefore proceed on the basis that the distinction between "patent unreasonableness" and "reasonableness *simpliciter*" has

been declared by the Court to be abandoned. I propose at this point to examine what I see as some of the implications of this abandonment.

E. Degrees of Deference

135 The distinction between reasonableness *simpliciter* and patent unreasonableness was not directed merely to "the magnitude or the immediacy of the defect" in the administrative decision (para. 41). The distinction also recognized that different administrative decisions command different degrees of deference, depending on who is deciding what.

136 A minister making decisions under the *Extradition Act*, R.S.C. 1985, c. E-23, to surrender a fugitive, for example, is said to be "at the extreme legislative end of the *continuum* of administrative decision making" (*Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 (S.C.C.), at p. 659). On the other hand, a ministerial delegate making a deportation decision according to ministerial guidelines was accorded considerably less deference in *Baker* (where the "reasonableness *simpliciter*" standard was applied). The difference does not lie only in the judge's view of the perceived immediacy of the defect in the administrative decision. In *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (S.C.C.), a unanimous Court adopted the caution in the context of counter-terrorism measures that "[i]f the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove" (para. 33). Administrative decision makers generally command respect more for their expertise than for their prominence in the administrative food chain. Far more numerous are the lesser officials who reside in the bowels and recesses of government departments adjudicating pension benefits or the granting or withholding of licences, or municipal boards poring over budgets or allocating costs of local improvements. Then there are the Cabinet and Ministers of the Crown who make broad decisions of public policy such as testing cruise missiles, *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.), or policy decisions arising out of decisions of major administrative tribunals, as in *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.), at p. 753, where the Court said: "The very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council."

137 Of course, the degree of deference also depends on the nature and content of the question. An adjudicative tribunal called on to approve pipelines based on "public convenience and necessity" (*Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 (S.C.C.)) or simply to take a decision in the "public interest" is necessarily accorded more room to manoeuvre than is a professional body, given the task of determining an appropriate sanction for a member's misconduct (*Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.)).

138 In our recent jurisprudence, the "nature of the question" before the decision maker has been considered as one of a number of elements to be considered in choosing amongst the various standards of review. At this point, however, I believe it plays a more important role in terms of substantive review. It helps to define the range of reasonable outcomes within which the administrator is authorized to choose.

139 The judicial sensitivity to different levels of respect (or deference) required in different situations is quite legitimate. "Contextualizing" a single standard of review will shift the debate (slightly) from choosing *between* two standards of reasonableness that each represent a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference. In practice, the result of today's decision may be like the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection to another without any overall saving to motorists in time or expense.

140 That said, I agree that the repeated attempts to define and explain the difference between reasonableness *simpliciter* and "patent" unreasonableness can be seen with the benefit of hindsight to be unproductive and distracting. Nevertheless, the underlying issue of degrees of deference (which the two standards were designed to address) remains.

141 Historically, our law recognized "patent" unreasonableness before it recognized what became known as reasonableness *simpliciter*. The adjective "patent" initially underscored the level of respect that was due to the designated decision maker, and signalled the narrow authority of the courts to interfere with a particular administrative *outcome* on substantive grounds. The reasonableness *simpliciter* standard was added at a later date to recognize a reduced level of deference. Reducing three standards of review to two standards of review does not alter the reality that at the high end "patent" unreasonableness (in the sense of manifestly indefensible) was not a bad description of the hurdle an applicant had to get over to have an administrative decision quashed on a ground of substance. The danger of labelling the most "deferential" standard as "reasonableness" is that it may be taken (wrongly) as an invitation to reviewing judges not simply to identify the usual issues, such as whether irrelevant matters were taken into consideration, or relevant matters were not taken into consideration, but to reweigh the input that resulted in the administrator's decision as if it were the judge's view of "reasonableness" that counts. At this point, the judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose.

F. Multiple Aspects of Administrative Decisions

142 Mention should be made of a further feature that also reflects the complexity of the subject matter of judicial review. An applicant may advance several grounds for quashing an

administrative decision. He or she may contend that the decision maker has misinterpreted the general law. He or she may argue, in the alternative, that even if the decision maker got the general law straight (an issue on which the court's view of what is correct will prevail), the decision maker did not properly apply it to the facts (an issue on which the decision maker is entitled to deference). In a challenge under the *Canadian Charter of Rights and Freedoms* to a surrender for extradition, for example, the minister will have to comply with the Court's view of *Charter* principles (the "correctness" standard), but if he or she correctly appreciates the applicable law, the court will properly recognize a wide discretion in the application of those principles to the particular facts. The same approach is taken to less exalted decision makers (*Moreau-Bérubé c. Nouveau-Brunswick*, [2002] 1 S.C.R. 249, 2002 SCC 11 (S.C.C.)). In the jargon of the judicial review bar, this is known as "segmentation".

G. The Existence of a Privative Clause

143 The existence of a privative clause is currently subsumed within the "pragmatic and functional" test as one factor amongst others to be considered in determining the appropriate standard of review, where it supports the choice of the patent unreasonableness standard. A single standard of "reasonableness" cannot mean that the degree of deference is unaffected by the existence of a suitably worded privative clause. It is certainly a relevant contextual circumstance that helps to calibrate the intrusiveness of a court's review. It signals the level of respect that must be shown. Chief Justice Laskin during argument once memorably condemned the quashing of a labour board decision protected by a strong privative clause, by saying "what's wrong with these people [the judges], can't they read?" A system of judicial review based on the rule of law ought not to treat a privative clause as conclusive, but it is more than just another "factor" in the hopper of pragmatism and functionality. Its existence should presumptively foreclose judicial review on the basis of *outcome* on substantive grounds unless the applicant can show that the clause, properly interpreted, permits it or there is some legal reason why it cannot be given effect.

H. A Broader Reappraisal

144 "Reasonableness" is a big tent that will have to accommodate a lot of variables that inform and limit a court's review of the outcome of administrative decision making.

145 The theory of our recent case law has been that once the appropriate standard of review is selected, it is a fairly straightforward matter to apply it. In practice, the criteria for selection among "reasonableness" standards of review proved to be undefinable and their application unpredictable. The present incarnation of the "standard of review" analysis requires a threshold debate about the four factors (non-exhaustive) which critics say too often leads to unnecessary delay, uncertainty and costs as arguments rage before the court about balancing expertise against the "real" nature of the question before the administrator,

or whether the existence of a privative clause trumps the larger statutory purpose, and so on. And this is all mere *preparation* for the argument about the actual substance of the case. While a measure of uncertainty is inherent in the subject matter and unavoidable in litigation (otherwise there wouldn't be any), we should at least (i) establish some presumptive rules and (ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case.

146 The going-in presumption should be that the standard of review of any administrative outcome on grounds of substance is not correctness but reasonableness ("contextually" applied). The fact that the legislature designated someone other than the court as the decision maker calls for deference to (or judicial respect for) the outcome, absent a broad statutory right of appeal. Administrative decisions generally call for the exercise of discretion. Everybody recognizes in such cases that there is *no* single "correct" outcome. It should also be presumed, in accordance with the ordinary rules of litigation, that the decision under review *is* reasonable until the applicant shows otherwise.

147 An applicant urging the non-deferential "correctness" standard should be required to demonstrate that the decision under review rests on an error in the determination of a *legal* issue not confided (or which constitutionally *could* not be confided) to the administrative decision maker to decide, whether in relation to jurisdiction or the general law. Labour arbitrators, as in this case, command deference on legal matters within their enabling statute or on legal matters intimately connected thereto.

148 When, then, should a decision be deemed "unreasonable"? My colleagues suggest a test *of irrationality* (para. 46), but the editors of de Smith point out that "many decisions which fall foul of [unreasonableness] have been coldly rational" (*Judicial Review of Administrative Action* (5th ed., H. Woolf and J. Jowell, 1995), para. 13-003). A decision meeting this description by this Court is *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 (S.C.C.), where the Minister's appointment of retired judges with little experience in labour matters to chair "interest" arbitrations (as opposed to "grievance" arbitrations) between hospitals and hospital workers was "coldly rational" in terms of the Minister's own agenda, but was held by a majority of this Court to be patently unreasonable in terms of the history, object and purpose of the authorizing legislation. He had not used the appointment power for the purposes for which the legislature had conferred it.

149 Reasonableness rather than rationality has been the traditional standard and, properly interpreted, it works. That said, a single "reasonableness" standard will now necessarily incorporate *both* the degree of deference formerly reflected in the distinction between patent unreasonableness and reasonableness *simpliciter*, *and* an assessment of the range of options reasonably open to the decision maker in the circumstances, in light of the reasons given for

the decision. Any reappraisal of our approach to judicial review should, I think, explicitly recognize these different dimensions to the "reasonableness" standard.

I. Judging "Reasonableness"

150 I agree with my colleagues that "reasonableness" depends on the context. It must be calibrated to fit the circumstances. A driving speed that is "reasonable" when motoring along a four-lane interprovincial highway is not "reasonable" when driving along an inner city street. The standard ("reasonableness") stays the same, but the reasonableness assessment will vary with the relevant circumstances.

151 This, of course, is the nub of the difficulty. My colleagues write:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

I agree with this summary but what is required, with respect, is a more easily applied framework into which the judicial review court and litigants can plug in the relevant context. No one doubts that in order to overturn an administrative outcome on grounds of substance (i.e. leaving aside errors of fairness or law which lie within the supervising "function" of the courts), the reviewing court must be satisfied that the outcome was outside the scope of reasonable responses open to the decision maker under its grant of authority, usually a statute. "[T]here is always a perspective", observed Rand J., "within which a statute is intended [by the legislature] to operate", *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.), at p. 140. How is that "perspective" to be ascertained? The reviewing judge will obviously want to consider the precise nature and function of the decision maker including its expertise, the terms and objectives of the governing statute (or common law) conferring the power of decision, including the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred, for example, the extent to which the decision formulates or implements broad public policy. In such cases, the range of permissible considerations will obviously be much broader than where the decision to be made is more narrowly circumscribed, e.g., whether a particular claimant is entitled to a disability benefit under governmental social programs. In some cases, the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant or others directly affected weighed against the public purpose which is sought to be advanced. In each case, careful consideration will have to be given to the reasons given for the decision. To this list, of course, may be added as many "contextual" considerations as the court considers relevant and material.

152 Some of these indicia were included from the outset in the pragmatic and functional test itself (see *Bibeault*, at p. 1088). The problem, however, is that under *Bibeault*, and the cases that followed it, these indicia were used to choose among the different standards of review, which were themselves considered more or less fixed. In *Ryan v. Law Society (New Brunswick)*, for example, the Court *rejected* the argument that "it is sometimes appropriate to apply the reasonableness standard more deferentially and sometimes less deferentially depending on the circumstances" (para. 43). It seems to me that collapsing everything beyond "correctness" into a single "reasonableness" standard will require a reviewing court to do exactly that.

153 The Court's adoption in this case of a single "reasonableness" standard that covers both the degree of deference assessment and the reviewing court's evaluation, in light of the appropriate degree of deference, of whether the decision falls within a range of reasonable administrative choices will require a reviewing court to juggle a number of variables that are necessarily to be considered together. Asking courts to have regard to more than one variable is not asking too much, in my opinion. In other disciplines, data are routinely plotted simultaneously along both an *X* axis and a *Y* axis, without traumatizing the participants.

154 It is not as though we lack guidance in the decided cases. Much has been written by various courts about deference and reasonableness in the particular contexts of different administrative situations. Leaving aside the "pragmatic and functional" test, we have ample precedents to show when it is (or is not) appropriate for a court to intervene in the outcome of an administrative decision. The problem is that courts have lately felt obliged to devote too much time to multi-part threshold tests instead of focussing on the who, what, why and wherefor of the litigant's complaint on its merits.

155 That having been said, a reviewing court ought to recognize throughout the exercise that fundamentally the "reasonableness" of the outcome is an issue given to others to decide. The exercise of discretion is an important part of administrative decision making. Adoption of a single "reasonableness" standard should not be seen by potential litigants as a lowering of the bar to judicial intervention.

J. Application to This Case

156 Labour arbitrators often have to juggle different statutory provisions in disposing of a grievance. The courts have generally attached great importance to their expertise in keeping labour peace. In this case, the adjudicator was dealing with his "home statute" plus other statutes intimately linked to public sector relations in New Brunswick. He was working on his "home turf", and the legislature has made clear in the privative clause that it intended the adjudicator to determine the outcome of the appellant's grievance. In this field, quick and cheap justice (capped by finality) advances the achievement of the legislative scheme.

Recourse to judicial review is discouraged. I would therefore apply a reasonableness standard to the adjudicator's interpretation of his "home turf" statutory framework.

157 Once under the flag of reasonableness, however, the salient question before the adjudicator in this case was essentially legal in nature, as reflected in the reasons he gave for his decision. He was not called on to implement public policy; nor was there a lot of discretion in dealing with a non-unionized employee. The basic facts were not in dispute. He was disposing of a *lis* which he believed to be governed by the legislation. He was right to be conscious of the impact of his decision on the appellant, but he stretched the law too far in coming to his rescue. I therefore join with my colleagues in dismissing the appeal.

***Deschamps J.* (concurring):**

158 The law of judicial review of administrative action not only requires repairs, it needs to be cleared of superfluous discussions and processes. This area of the law can be simplified by examining the *substance* of the work courts are called upon to do when reviewing any case, whether it be in the context of administrative or of appellate review. Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. Very little else needs to be done in order to determine whether deference needs to be shown to an administrative body.

159 By virtue of the Constitution, superior courts are the only courts that possess inherent jurisdiction. They are responsible both for applying the laws enacted by Parliament and the legislatures and for insuring that statutory bodies respect their legal boundaries. Parliament and the legislatures cannot totally exclude judicial oversight without overstepping the division between legislative or executive powers and judicial powers. Superior courts are, in the end, the protectors of the integrity of the rule of law and the justice system. Judicial review of administrative action is rooted in these fundamental principles and its boundaries are largely informed by the roles of the respective branches of government.

160 The judicial review of administrative action has, over the past 20 years, been viewed as involving a preliminary analysis of whether deference is owed to an administrative body based on four factors: (1) the nature of the question, (2) the presence or absence of a privative clause, (3) the expertise of the administrative decision maker and (4) the object of the statute. The process of answering this preliminary question has become more complex than the determination of the substantive questions the court is called upon to resolve. In my view, the analysis can be made plainer if the focus is placed on the issues the parties need to have adjudicated rather than on the nature of the judicial review process itself. By focusing first on "the nature of the question", to use what has become familiar parlance, it will become apparent that all four factors need not be considered in every case and that the judicial

review of administrative action is often not distinguishable from the appellate review of court decisions.

161 Questions before the courts have consistently been identified as either questions of fact, questions of law or questions of mixed fact and law. Whether undergoing appellate review or administrative law review, decisions on questions of fact always attract deference. The use of different terminology — "palpable and overriding error" versus "unreasonable decision" — does not change the substance of the review. Indeed, in the context of appellate review of court decisions, this Court has recognized that these expressions as well as others all encapsulate the same principle of deference with respect to a trial judge's findings of fact: *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25 (S.C.C.), at paras. 55-56. Therefore, when the issue is limited to questions of fact, there is no need to enquire into any other factor in order to determine that deference is owed to an administrative decision maker.

162 Questions of law, by contrast, require more thorough scrutiny when deference is evaluated, and the particular context of administrative decision making can make judicial review different than appellate review. Although superior courts have a core expertise to interpret questions of law, Parliament or a legislature may have provided that the decision of an administrative body is protected from judicial review by a privative clause. When an administrative body is created to interpret and apply certain legal rules, it develops specific expertise in exercising its jurisdiction and has a more comprehensive view of those rules. Where there is a privative clause, Parliament or a legislature's intent to leave the final decision to that body cannot be doubted and deference is usually owed to the body.

163 However, privative clauses cannot totally shield an administrative body from review. Parliament, or a legislature, cannot have intended that the body would be protected were it to overstep its delegated powers. Moreover, if such a body is asked to interpret laws in respect of which it does not have expertise, the constitutional responsibility of the superior courts as guardians of the rule of law compels them to insure that laws falling outside an administrative body's core expertise are interpreted correctly. This reduced deference insures that laws of general application, such as the Constitution, the common law and the *Civil Code*, are interpreted correctly and consistently. Consistency of the law is of prime societal importance. Finally, deference is not owed on questions of law where Parliament or a legislature has provided for a statutory right of review on such questions.

164 The category of questions of mixed fact and law should be limited to cases in which the determination of a legal issue is inextricably intertwined with the determination of facts. Often, an administrative body will first identify the rule and then apply it. Identifying the contours and the content of a legal rule are questions of law. Applying the rule, however, is a question of mixed fact and law. When considering a question of mixed fact and law, a

reviewing court should show an adjudicator the same deference as an appeal court would show a lower court.

165 In addition, Parliament or a legislature may confer a discretionary power on an administrative body. Since the case at bar does not concern a discretionary power, it will suffice for the purposes of these reasons to note that, in any analysis, deference is owed to an exercise of discretion unless the body has exceeded its mandate.

166 In summary, in the adjudicative context, the same deference is owed in respect of questions of fact and questions of mixed fact and law on administrative review as on an appeal from a court decision. A decision on a question of law will also attract deference, provided it concerns the interpretation of the enabling statute and provided there is no right of review.

167 I would be remiss were I to disregard the difficulty inherent in any exercise of deference. In *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 (S.C.C.), LeBel J. explained why a distinction between the standards of patent unreasonableness and unreasonableness *simpliciter* is untenable. I agree. The problem with the definitions resides in attempts by the courts to enclose the concept of reasonableness in a formula fitting all cases. No matter how this Court defines this concept, any context considered by a reviewing court will, more often than not, look more like a rainbow than a black and white situation. One cannot change this reality. I use the word "deference" to define the contours of reasonableness because it describes the attitude adopted towards the decision maker. The word "reasonableness" concerns the decision. However, neither the concept of reasonableness nor that of deference is particular to the field of administrative law. These concepts are also found in the context of criminal and civil appellate review of court decisions. Yet, the exercise of the judicial supervisory role in those fields has not given rise to the complexities encountered in administrative law. The process of stepping back and taking an *ex post facto* look at the decision to determine whether there is an error justifying intervention should not be more complex in the administrative law context than in the criminal and civil law contexts.

168 In the case at bar, the adjudicator was asked to adjudicate the grievance of a non-unionized employee. This meant that he had to identify the rules governing the contract. Identifying those rules is a question of law. Section 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, incorporates the rules of the common law, which accordingly become the starting point of the analysis. The adjudicator had to decide whether those rules had been ousted by the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"), as applied, *mutatis mutandis*, to the case of a non-unionized employee (ss. 97(2.1), 100.1(2) and 100.1(5)). The common law rules relating to the dismissal of an employee differ completely from the ones provided for in the *PSLRA* that the adjudicator is regularly required to interpret. Since the common law, not the adjudicator's enabling statute, is the starting point of the analysis,

and since the adjudicator does not have specific expertise in interpreting the common law, the reviewing court does not have to defer to his decision on the basis of expertise. This leads me to conclude that the reviewing court can proceed to its own interpretation of the rules applicable to the non-unionized employee's contract of employment and determine whether the adjudicator could enquire into the cause of the dismissal. The applicable standard of review is correctness.

169 It is clear from the adjudicator's reasoning that he did not even consider the common law rules. He said (p. 5):

> An employee to whom section 20 of the Civil Service Act and section 100.1 of the PSLR Act apply may be discharged for cause, with reasonable notice or with severance pay in lieu of reasonable notice. A discharge for cause may be for disciplinary or non-disciplinary reasons.

170 The employer's common law right to dismiss without cause is not alluded to in this key passage of the decision. Unlike a unionized employee, a non-unionized employee does not have employment security. His or her employment may be terminated without cause. The corollary of the employer's right to dismiss without cause is the employee's right to reasonable notice or to compensation in lieu of notice. The distinction between the common law rules of employment and the statutory rules applicable to a unionized employee is therefore essential if s. 97(2.1) is to be applied *mutatis mutandis* to the case of a non-unionized employee as required by s. 100.1(5). The adjudicator's failure to inform himself of this crucial difference led him to look for a cause, which was not relevant in the context of a dismissal without cause. In a case involving dismissal without cause, only the amount of the compensation or the length of the notice is relevant. In a case involving dismissal for cause, the employer takes the position that no compensation or notice is owed to the employee. This was not such a case. In the case at bar, the adjudicator's role was limited to evaluating the length of the notice. He erred in interpreting s. 97(2.1) in a vacuum. He overlooked the common law rules, misinterpreted s. 100.1(5) and applied s. 97(2.1) literally to the case of a non-unionized employee.

171 This case is one where, even if deference had been owed to the adjudicator, his interpretation could not have stood. The legislature could not have intended to grant employment security to non-unionized employees while providing only that the *PSLRA* was to apply *mutatis mutandis*. This right is so fundamental to an employment relationship that it could not have been granted in so indirect and obscure a manner.

172 In this case, the Court has been given both an opportunity and the responsibility to simplify and clarify the law of judicial review of administrative action. The judicial review of administrative action need not be a complex area of law in itself. Every day, reviewing courts

decide cases raising multiple questions, some of fact, some of mixed fact and law and some purely of law; in various contexts, the first two of these types of questions tend to require deference, while the third often does not. Reviewing courts are already amply equipped to resolve such questions and do not need a specialized analytical toolbox in order to review administrative decisions.

173 On the issue of natural justice, I agree with my colleagues. On the result, I agree that the appeal should be dismissed.

Appeal dismissed.

Pourvoi rejeté.

APPENDIX

Relevant Statutory Provisions

Civil Service Act, S.N.B. 1984, c. C-5.1:

> **20** Subject to the provisions of this Act or any other Act, termination of the employment of a deputy head or an employee shall be governed by the ordinary rules of contract.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25:

> **92**(1) Where an employee has presented a grievance up to and including the final level in the grievance process with respect to
>
> > (a) the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, or
> >
> > (b) disciplinary action resulting in discharge, suspension or a financial penalty,
>
> and his grievance has not been dealt with to his satisfaction, he may, subject to subsection (2), refer the grievance to adjudication.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25, as amended:

> **97**(2.1) Where an adjudicator determines that an employee has been discharged or otherwise disciplined by the employer for cause and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined, the adjudicator may substitute such other penalty for the discharge or discipline as to the adjudicator seems just and reasonable in all the circumstances.

. . . . .

100.1(2) An employee who is not included in a bargaining unit may, in the manner, form and within such time as may be prescribed, present to the employer a grievance with respect to discharge, suspension or a financial penalty.

100.1(3) Where an employee has presented a grievance in accordance with subsection (2) and the grievance has not been dealt with to the employee's satisfaction, the employee may refer the grievance to the Board who shall, in the manner and within such time as may be prescribed, refer the grievance to an adjudicator appointed by the Board.

. . . . .

100.1(5) Sections 19, 97, 98.1, 101, 108 and 111 apply *mutatis mutandis* to an adjudicator to whom a grievance has been referred in accordance with subsection (3) and in relation to any decision rendered by such adjudicator.

. . . . .

101(1) Except as provided in this Act, every order, award, direction, decision, declaration or ruling of the Board, an arbitration tribunal or an adjudicator is final and shall not be questioned or reviewed in any court.

101(2) No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain the Board, an arbitration tribunal or an adjudicator in any of its or his proceedings.

Footnotes

* Corrigenda issued by the Court on March 10, 11, 2008, and April 17, 2008 have been incoporated herein.

1 Para. 41

2 Para. 47

3 Para. 48

4 Para. 53

5 Para. 133

6 Para. 144

7 Para. 146

End of Document

TAB 2

1999 CarswellNat 1124
Supreme Court of Canada

Baker v. Canada (Minister of Citizenship & Immigration)

1999 CarswellNat 1124, 1999 CarswellNat 1125, [1999] 2 S.C.R. 817, [1999] F.C.J. No. 39, [1999] S.C.J. No. 39, 14 Admin. L.R. (3d) 173, 174 D.L.R. (4th) 193, 1 Imm. L.R. (3d) 1, 243 N.R. 22, 89 A.C.W.S. (3d) 777, J.E. 99-1412

Mavis Baker, Appellant v. Minister of Citizenship and Immigration, Respondent and The Canadian Council of Churches, the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, the Canadian Council for Refugees and the Charter Committee on Poverty Issues, Interveners

L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache, Binnie, JJ.A.

Heard: November 4, 1998
Judgment: July 9, 1999
Docket: 25823

Proceedings: reversing *Baker v. Canada (Minister of Citizenship & Immigration)* (1996), [1996] F.C.J. No. 1726, [1996] F.C.J. No. 1570, 1996 CarswellNat 2693, 1996 CarswellNat 2052, [1997] 2 F.C. 127, 122 F.T.R. 320 (note), 207 N.R. 57, 142 D.L.R. (4th) 554 (Fed. C.A.); affirming *Baker v. Canada (Minister of Citizenship & Immigration)* (1995), [1995] F.C.J. No. 1441, 1995 CarswellNat 1244, 101 F.T.R. 110, 31 Imm. L.R. (2d) 150 (Fed. T.D.)

Counsel: *Roger Rowe* and *Rocco Galanti*, for Appellant.
Urszula Kaczmarczyk and *Cheryl D. Mitchell*, for Respondent.
Sheena Scott and *Sharryn Aiken*, for Interveners The Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, the Canadian Council for Refugees.
John Terry and *Craig Scott*, for Intervener the Charter Committee on Poverty Issues.
Barbara Jackman and *Marie Chen*, for Intervener the Canadian Council of Churches.

Subject: Immigration; Public; Human Rights

Related Abridgment Classifications

Administrative law
III Requirements of natural justice
III.1 Right to hearing
III.1.b Duty of fairness

Administrative law
III Requirements of natural justice
III.1 Right to hearing
III.1.c Procedural rights at hearing
III.1.c.i Opportunity to respond and make submissions

Administrative law
III Requirements of natural justice
III.1 Right to hearing
III.1.c Procedural rights at hearing
III.1.c.vi Reasons for decision

Administrative law
III Requirements of natural justice
III.2 Bias
III.2.c Personal bias
III.2.c.ii Apprehended

Administrative law
IV Standard of review
IV.3 Reasonableness
IV.3.a Reasonableness simpliciter

Administrative law
VI Discretion of tribunal under review
VI.1 General principles

Immigration and citizenship
II Admission
II.4 Application for temporary resident or immigrant visa
II.4.d Inland applications
II.4.d.ii Application of humanitarian and compassionate considerations
II.4.d.ii.G Miscellaneous

Immigration and citizenship
II Admission
II.4 Application for temporary resident or immigrant visa
II.4.e Best interests of child

Immigration and citizenship
II Admission

II.5 Appeals and judicial review
II.5.b Judicial review
II.5.b.i Jurisdiction
Immigration and citizenship
VI Appeals to Federal Court of Appeal and Supreme Court of Canada
VI.4 Certification of questions by Federal Court Trial Division
VI.4.i Procedure
Statutes
II Interpretation
II.5 Extrinsic aids
II.5.d Statutes on same subject (in pari materia)

Headnote

Immigration and citizenship --- Admission — Application for temporary resident or immigrant visa — Inland applications — Application of humanitarian and compassionate considerations

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified regarding whether immigration authorities are required to treat best interests of child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Junior immigration officer's notes constituted decision and demonstrated reasonable apprehension of bias — Officer appeared to have drawn conclusions based not on evidence but on fact that applicant was single mother with several children and was diagnosed with mental illness — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion notwithstanding deference that should be given to officer's decision — Reasons also failed to give sufficient weight or consideration to hardship that might be caused to applicant if returned to country of origin.

Immigration and citizenship --- Admission — Application for temporary resident or immigrant visa — Best interests of child

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified of whether federal immigration authorities are required to treat best interests of Canadian child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered

in negative — Applicant appealed — Appeal allowed — Reasonable exercise of power under s. 114(2) of Act requires close attention to interests and needs of children — Children's rights and attention to their interests are central humanitarian and compassionate values in Canadian society — Interests of children were minimized in manner inconsistent with Canadian humanitarian and compassionate tradition and Minister's guidelines — Reasons for decision did not indicate that decision was made in manner alive, attentive, or sensitive to interests of applicant's children — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion notwithstanding deference that should be given to officer's decision.

Immigration and citizenship --- Appeals to Federal Court of Appeal and Supreme Court of Canada — Certification of questions by Federal Court Trial Division

Section 83(1) of Immigration Act does not require Federal Court of Appeal to address only certified question — Once question has been certified, then Federal Court of Appeal may consider all aspects of appeal lying within its jurisdiction.

Administrative law --- Requirements of natural justice — Right to hearing — Duty of fairness

Duty of fairness is flexible and variable and depends on context of particular statute and rights affected — Participatory rights within that duty ensure that administrative decisions are made using fair and open procedure appropriate to decision being made and its statutory, institutional, and social context with opportunity for those affected by decision to put forward their views and evidence fully and have them considered by decision-maker — Factors for determining requirements of duty include nature of decision being made and process followed in making it, nature of statutory scheme and terms of statute pursuant to which body operates, importance of decision to individuals affected, legitimate expectations of person challenging decision, and choices of procedure made by agency itself — Other factors may also be important when considering aspects of duty of fairness unrelated to participatory rights — Duty of fairness applies to humanitarian and compassionate applications under Immigration Act.

Administrative law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Opportunity to respond and make submissions

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused written application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate (H & C) grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Applicant appealed — Appeal allowed on other grounds — Duty of procedural fairness applies to H & C decisions — There was no legitimate expectation that specific procedural rights would be accorded above those normally required by duty of fairness — H & C application is different from judicial decision because it involves exercise of considerable discretion, requires consideration of multiple factors, and is exception to general principles of of

Canadian immigration law — Duty of fairness requires that applicant and those whose important interests are affected by decision in fundamental way have meaningful opportunity to present evidence relevant to their case and have it fully and fairly considered — Lack of oral hearing or notice of such hearing does not violate procedural fairness — Opportunity to produce full and complete written documentation was sufficient.

Administrative law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Reasons for decision

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused written application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate (H & C) grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Applicant appealed — Appeal allowed on other grounds — Duty of procedural fairness requires written explanation for decision where decision has important significance for individual or where there is statutory right of appeal — Profound importance of H & C decisions to those affected militates in favour of requiring reasons to be provided — Requirement was satisfied by provision of junior immigration officer's notes — Individuals are entitled to fair procedures and open decision-making but in administrative context, this transparency may occur in various ways.

Administrative law --- Requirements of natural justice — Bias — Personal bias — Apprehended

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant alleged that there was reasonable apprehension of bias — Applicant unsuccessfully applied for judicial review — Applicant appealed — Appeal allowed — Procedural fairness requires decision to be made free from reasonable apprehension of bias by impartial decision-maker — Duty applies to all immigration officers playing role in decision-making — Immigration decisions require sensitivity and understanding by decision-makers — There must be recognition of diversity, understanding of others and openness to difference — Immigration officer's notes gave impression that conclusion may have been based not on evidence but on fact that applicant was single mother with several children and had been diagnosed with psychiatric illness — Reasonable and well-informed members of community would conclude that reviewing officer did not approach case with impartiality appropriate to decision made by immigration officer.

Administrative law --- Standard of review — Reasonableness — Reasonableness simpliciter

Review of substantive aspects of discretionary decisions is to be approached within pragmatic and functional framework given difficulty in making rigid classifications between discretionary and non-discretionary decisions — Relevant factors include expertise of tribunal, nature of decision being made, language of provision and surrounding legislation, whether decision is polycentric, intention revealed by statutory language, and amount of choice left by Parliament to decision-maker — Discretion must be exercised in accordance with boundaries imposed in statute, principles of rule of law, principles of administrative law, fundamental values of Canadian society, and principles of Canadian Charter of Rights and Freedoms.

Administrative law --- Discretion of tribunal under review — General principles

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified of whether federal immigration authorities are required to treat best interests of Canadian child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Reasonable exercise of power conferred by section requires close attention to interests and needs of children — Children's rights and attention to their interests are central humanitarian and compassionate values in Canadian society — Reasons for decision did not indicate that decision was made in manner alive, attentive, or sensitive to interests of applicant's children — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion notwithstanding deference that should be given to officer's decision.

Immigration and citizenship --- Admission — Appeals and judicial review — Judicial review — Jurisdiction

"Reasonableness simpliciter » is standard of review of discretionary decision under s. 114(2) of Immigration Act and s. 2.1 of Immigration Regulations determining whether humanitarian and compassionate considerations warrant exemption from requirements of Act — Considerable deference should be given to immigration officers exercising powers conferred by Act, given fact-specific nature of inquiry, its role in statutory scheme as exception, fact that decision-maker is Minister of Citizenship and Immigration, and considerable discretion given by wording of statute — However, lack of privative clause, existence of judicial review, and nature of decision as individual rather than polycentric suggest that standard is not as deferential as "patent unreasonableness".

Statutes --- Interpretation — Extrinsic aids — Statutes in pari materia

Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s.

114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified of whether, given that Immigration Act does not expressly incorporate language of Canada's international obligations under International Convention on the Rights of the Child, federal immigration authorities must treat best interests of Canadian child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Values in international human rights law assist in statutory interpretation and judicial review — Convention's values recognize importance of being attentive to children's rights and best interests when making decisions relating to and affecting their future — Convention's principles place special importance on protections for children and on consideration of their interests, needs, and rights — Reasons for decision did not indicate that decision was made in manner alive, attentive, or sensitive to interests of applicant's children and did not consider them important factor in decision — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion.

Étrangers, immigration et citoyenneté --- Admission — Demande de visa à titre de visiteur ou immigrant — Demande effectuée sur le territoire — Demande pour des motifs d'ordre humanitaire

Requérante est entrée au Canada en 1981 et a subvenu à ses besoins pendant 11 ans avant d'être diagnostiquée comme souffrant de schizophrénie avec paranoïa, et d'obtenir de l'assistance sociale — Après l'ordonnance de déportation, l'agent d'immigration a refusé d'exercer le pouvoir discrétionnaire prévu au par. 114(2) de la Loi sur l'immigration, fondé sur des motifs d'ordre humanitaire — Demande de contrôle judiciaire de la requérante a été rejetée — Requérante a formé un pourvoi — Question a été certifiée quant à savoir si les autorités de l'immigration devaient traiter le meilleur intérêt des enfants comme la principale considération au moment d'évaluer la demande de la requérante en vertu du par. 114(2) de la Loi — Pourvoi de la requérante à l'égard de la question certifiée a été rejeté — Requérante a formé un pourvoi — Pourvoi accueilli — Question a reçu une réponse affirmative — Notes de l'agent de l'immigration constituaient une décision et démontraient une crainte raisonnable de partialité — Agent semble avoir tiré des conclusions non fondées sur la preuve mais sur le fait que la requérante était monoparentale, qu'elle avait plusieurs enfants et qu'elle était atteinte d'une maladie mentale — Omission de considérer sérieusement le meilleur intérêt des enfants de la requérante constituait un exercice déraisonnable du pouvoir discrétionnaire, sans tenir compte de la déférence à laquelle la décision de l'agent devrait avoir droit — Loi sur l'immigration, L.R.C. 1985, c. I-2, par. 114(2).

The applicant entered Canada as a visitor in 1981 and continued to remain in the country. She had four Canadian-born children. She supported herself illegally for 11 years before being diagnosed as paranoid schizophrenic. She subsequently collected welfare and underwent treatment at a mental health centre. In 1992 she was ordered deported. An immigration

officer refused discretionary action under s. 114(2) of the *Immigration Act* based on humanitarian and compassionate grounds.

In dismissing the applicant's application for judicial review, the motions judge found that the *Convention on the Rights of the Child* did not apply and was not part of domestic law. The motions judge also found that the evidence showed the children were a significant factor in the decision-making process. The motions judge certified a question as to whether the immigration authorities were required to treat the best interests of the child as a primary consideration in assessing an applicant under s. 114(2) of the Act, given that the Act did not expressly incorporate the language of Canada's international obligations with respect to the Convention.

On appeal of the certified question, the court held that the Convention could not have legal effect in Canada as it had not been implemented through domestic legislation. The Convention could not be interpreted to impose an obligation upon the government to give primacy to the interests of the children in deportation proceedings. Finally, because the doctrine of legitimate expectations does not create substantive rights, and because a requirement that the best interests of the children be given primacy by a decision-maker under s. 114(2) of the Act would be to create a substantive right, the doctrine did not apply.

The applicant appealed.

Held: The appeal was allowed.

Per L'Heureux-Dubé J. (Gonthier, McLachlin, Bastarache and Binnie JJ. concurring): The Convention did not give rise to a legitimate expectation that when the decision on the applicant's humanitarian and compassionate grounds application was made, specific procedural rights above what would normally be required under the duty of fairness would be accorded, a positive finding would be made, or particular criteria would be applied. The Convention is not the equivalent to a government representation about how such applications will be decided.

The lack of an oral hearing did not constitute a violation of the requirements of procedural fairness. The opportunity, which was accorded for the applicant or her children to produce full and complete written documentation in relation to all aspects of her application, satisfied the requirements of the participatory rights required by the duty of fairness.

The duty of procedural fairness required a written explanation for the decision, which was done. The junior immigration officer's notes constituted the decision and were provided to the applicant. However, the notes demonstrated a reasonable apprehension of bias. The notes appeared to link the applicant's mental illness, her training as a domestic worker and the fact that she had eight children in total to the conclusion that she would, therefore, be a strain on the social welfare system for the rest of her life. The conclusion drawn was contrary to the psychiatrist's letter, which stated that with treatment she could remain well and return to being a productive member of society. The statements gave the impression that the junior officer may have been drawing conclusions based not on the evidence before him, but on

the fact that she was a single mother with several children, and had been diagnosed with a psychiatric illness.

The failure to give serious consideration to the interests of the applicant's children constituted an unreasonable exercise of discretion, notwithstanding the important deference that should be given to the immigration officer's decision. The reasons failed to give sufficient weight or consideration to the hardship that a return to Jamaica might cause the applicant, given that she had been in Canada for 12 years, was ill and might not be able to obtain treatment in Jamaica, and would necessarily be separated from some of her children. Attentiveness and sensitivity to the importance of the rights of the children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for a humanitarian and compassionate decision to be made in a reasonable manner. While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values.

Per Iacobucci J. (Cory J. concurring): The certified question should be answered in the negative. An international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until it has been incorporated into domestic law by way of implementing legislation. The primacy accorded to the rights of children in the Convention is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament.

La requérante est entrée au Canada en 1981 avec le statut de visiteur et y est restée par la suite. Elle a donné naissance à quatre enfants au Canada. Elle a illégalement subvenu à ses besoins pendant 11 ans, soit jusqu'au moment où l'on a diagnostiqué qu'elle souffrait de schizophrénie paranoïaque. Elle a par la suite touché de l'aide sociale et a suivi un traitement dans un établissement de santé. En 1992, une mesure d'expulsion a été prise contre elle. Un fonctionnaire de l'immigration a refusé d'exercer le pouvoir discrétionnaire qui lui était conféré par l'art 114(2) de la *Loi sur l'immigration* et qui était fondé sur des motifs d'ordre humanitaire.

En rejetant la requête en révision judiciaire de la requérante, la juge saisie de la requête a conclu que la *Convention relative aux droits de l'enfant* ne s'appliquait pas et que ses dispositions ne faisaient pas partie du droit interne canadien. Elle a également conclu qu'il ressortait de la preuve que les enfants avaient constitué un facteur important dans le cadre du processus décisionnel. La juge s'est également prononcée sur la question de savoir si, dans le cadre de l'examen d'une requête faite en vertu de l'art. 114(2) de la Loi, les autorités en matière d'immigration étaient tenues de considérer le meilleur intérêt des enfants comme constituant un élément primordial, même si la Loi n'incorporait pas expressément le langage des obligations internationales du Canada en ce qui concerne la Convention .

En se prononçant sur l'appel de la décision portant sur la question certifiée, la Cour d'appel a estimé que la Convention ne pouvait avoir d'effet juridique au Canada, puisqu'elle n'avait pas été intégrée dans la législation nationale. La Convention ne pouvait être interprétée comme

imposant au gouvernement l'obligation d'accorder priorité à l'intérêt des enfants dans le cadre des procédures d'expulsion. Enfin, compte tenu que la doctrine de l'attente légitime ne crée pas de droits matériels et qu'imposer à un décideur l'obligation d'accorder la primauté au meilleur intérêt des enfants en vertu de l'art. 114(2) de la Loi serait de nature à créer un droit matériel, la doctrine était inapplicable.

La requérante a formé un pourvoi à l'encontre de la décision.

Held: Le pourvoi a été accueilli.

Le juge L'Heureux-Dubé (les juges Gonthier, McLachlin, Bastarache et Binnie y souscrivant) : La Convention n'a pas créé chez la requérante l'attente légitime que sa demande fondée sur des motifs d'ordre humanitaire et de compassion donnerait lieu à des droits procéduraux particuliers plus étendus que ceux qui seraient normalement exigés en vertu de l'obligation d'équité, qu'une décision favorable serait rendue ou que des critères particuliers seraient appliqués. La Convention ne constituait pas l'équivalent d'une déclaration gouvernementale sur la façon dont les demandes doivent être tranchées.

L'absence d'audience ne contrevenait pas aux exigences imposées en vertu de l'équité procédurale. La possibilité qui avait été donnée à la requérante ou à ses enfants de produire toute la documentation écrite se rapportant à tous les aspects de sa requête satisfaisait aux exigences relatives aux droits de participation imposées en vertu de l'obligation d'agir équitablement.

L'obligation d'équité procédurale exigeait que les motifs écrits de la décision soient fournis, ce qui a été fait. Les notes de l'agent subalterne constituaient les motifs de la décision et elles ont été fournies à la requérante. Les notes donnaient toutefois lieu à une crainte raisonnable de partialité. Elles semblaient relier les troubles mentaux de la requérante, sa formation comme domestique et le fait qu'elle avait au total huit enfants à la conclusion qu'elle constituerait, par conséquent, un fardeau pour le système d'aide sociale jusqu'à la fin de ses jours. La conclusion tirée allait à l'encontre de la lettre du psychiatre qui indiquait qu'à l'aide d'un traitement, l'état de la requérante pouvait s'améliorer et qu'elle pourrait redevenir un membre productif de la société. Ces notes donnaient l'impression que l'agent subalterne avait tiré ses conclusions, non pas en se fondant sur la preuve qu'il avait devant lui, mais plutôt sur le fait que la requérante était une mère célibataire avec plusieurs enfants et sur le fait qu'elle était atteinte de troubles psychiatriques.

Le défaut de prendre sérieusement en compte l'intérêt des enfants de la requérante constituait un exercice déraisonnable du pouvoir discrétionnaire et ce, malgré le degré élevé de retenue qu'il convient d'observer à l'égard de la décision de l'agent d'immigration. Les motifs n'accordaient pas un poids et une considération suffisants au préjudice qu'un retour en Jamaïque pouvait causer à la requérante compte tenu qu'elle avait vécu pendant 12 ans au Canada, qu'elle était malade, qu'elle ne pourrait probablement pas recevoir des soins en Jamaïque et qu'elle serait inévitablement séparée de certains de ses enfants. L'attention et la sensibilité manifestées à l'égard de l'importance des droits des enfants, à leur meilleur intérêt et au préjudice qu'ils pourraient subir en raison d'une décision rejettant la requête sont les

éléments essentiels d'une décision qui doit être prise de façon raisonnable. Même si, dans le cadre des demandes de contrôle judiciaire, il convient de faire preuve de retenue à l'égard des décisions des agents d'immigration rendues en vertu de l'art. 114(2), leurs décisions ne peuvent être maintenues lorsque la façon dont la décision a été rendue et l'approche adoptée sont contraires aux valeurs humanitaires.
Le juge Iacobucci (le juge Cory y souscrivant) : Une réponse négative devrait être donnée à la question certifiée. Une convention internationale ratifiée par le pouvoir exécutif du gouvernement n'a aucun effet en droit canadien tant que ses dispositions ne sont pas incorporées dans le droit interne par une loi les rendant applicables. La primauté accordée aux droits des enfants par la Convention n'est d'aucune pertinence tant et aussi longtemps que ses dispositions n'ont pas été intégrées dans une loi adoptée par le Parlement.
Annotation

There is a lot of clarification material resulting from this unusual decision. One article entitled the "Shame of Shah" is presently being engrossed by the editor. I say "shame" because of the extraordinary encroachment on the Canadian notion of fairness created by the Federal Court of Appeal in *Muliadi v. Canada (Minister of Employment & Immigration)*, 18 Admin. L.R. 243, 66 N.R. 8, [1986] 2 F.C. 205 (Fed. C.A.), and which was so casually proclaimed by the Court of Appeal in *Shah v. Canada (Minister of Employment & Immigration)* (1994), 29 Imm. L.R. (2d) 82, 170 N.R. 238, 81 F.T.R. 320 (note) (Fed. C.A.). It was for the Supreme Court of Canada in *Baker* to lead the way in disposing of this negative virus manifested in *Shah*. If we are going to have an *Immigration Ac*t inviting applications with signposts such as "Humanitarian and Compassionate," it follows that there is not a limited duty of fairness. The *Shah* dictum of the three Court of Appeal judges was unceremoniously and quickly dumped by the Supreme Court of Canada, but not before this backward looking case was approved without hardly a murmur of dissent in more than a hundred cases that were to follow *Shah*. That is its shame. For if so noble a doctrine of fairness is said to exist by the Supreme Court, how is it that no one else could see it? What limitations were imposed on the juridical eyes and conscience of our jurists not to possess a similar vision that to the Supreme Court was so evident?

One of the corollary aspects of this case is that: where there is no fairness, it allows bias, prejudice and unfairness to creep in. Look at the findings of the Supreme Court of Canada in *Baker* at para. 48:

In my opinion, the well-informed member of the community would perceive bias when reading Officer Lorenz's comments. His notes, and the manner in which they are written, do not disclose the existence of an open mind or the weighing of the particular circumstance of the case *free from stereotypes* . . . His use of capitals to highlight the number of Ms. Baker's children may also suggest to a reader that this was a reason to deny her status.

[Emphasis mine]

The learned L'Heureux Dubé J. goes on to deal with the appropriate test of a choice of three when dealing with applications under s. 114(2) of the *Immigration Act*, and the test is reasonableness simpliciter.

She goes on to find that it must be reasonable to deal with the interests of the children of the applicant and that they are nowhere dealt with by the decision-makers. She states, at para. 65:

. . . I believe that the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer . . .

and later, at para. 76:

Therefore, both because there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias, and because the exercise of the H & C discretion was unreasonable, I would allow the appeal.

Another matter arising out of *Baker* now being argued by justice lawyers is that the reasons and, indeed, the CAIPS notes can now be read in from the record as evidence. Justice lawyers are using any argument to avoid the making of an affidavit in judicial review applications and thus exposing immigration officers to cross-examination.

This matter was convincingly and clearly dealt with by the Court of Appeal in *Wang v. Canada (Minister of Employment & Immigration)*, 12 Imm. L.R. (2d) 178, 121 N.R. 243, [1991] 2 F.C. 165, 40 F.T.R. 239 (note) (Fed. C.A.).

However, since the notes of Lorenz and the CAIPS notes were read by the court in the *Baker* case, can it be said that the law in *Wang* is now being overruled? I would submit not.

In a judicial review application, under the rules, an applicant can call for the record, and indeed it is often so done. This is not unlike productions required by parties, which occur in a superior court of a province. In such cases, when called upon under the rules, a defendant, or indeed a plaintiff, must submit to production and make an affidavit that the documents produced are totally those that are within the possession and power of the litigant to produce.

However, the productions are not evidence for the party producing such documentation, as he must prove the documents that are produced by him and not otherwise admitted. But this does not prevent the other party from producing and putting such documents into evidence, as these productions from the opponents' point of view constitute an admission.

Therefore, an applicant can put in such record as he requires without proving anything, but this does not mean that the respondent can call up such record as he requires, as evidence of the contents therein. It must be provided by affidavit of one who has personal knowledge.

Moreover, if the document is one that is necessary for the respondent to call into evidence and he fails to do so, then there is an adverse inference to be taken that, had he called the evidence in the ordinary way, it would not have been in his favour.

Commentaire

Cette décision particulière clarifie plusieurs éléments. Un article intitulé « La honte de Shah » est en voie de rédaction par l'éditeur. Je dis « honte » à cause de l'empiètement extraordinaire sur la notion canadienne d'équité créée par la Cour fédérale d'appel dans la cause *Muliadi c. Canada (Ministre de l'Emploi & de l'Immigration)*, 18 Admin. L.R. 243, 66 N.R. 8, [1986] 2 C.F. 205 (C.A. féd.) et qui fut suivie sans retenue par la Cour d'appel dans *Shah c. Canada (Ministre de l'Emploi & de l'Immigration)*, [1994] 29 Imm. L.R. (2d) 82, 170 N.R. 238, 81 F.T.R. 320 (note) (C.A. féd.). Il revenait à la Cour suprême du Canada, dans *Baker*, de disposer de ce virus négatif établi dans l'affaire *Shah*. Si nous avons une *Loi sur l'immigration* invitant les demandes en affichant des motifs « humanitaires et de compassion », il s'ensuit qu'il n'existe pas de limite à l'équité. La maxime de *Shah* établie par trois juges de la Cour d'appel fut écartée rapidement et sans cérémonie par la Cour suprême du Canada, mais pas avant que ce jugement, qui représentait un pas en arrière, n'ait été appliqué dans une centaine de cas, sans même provoquer un murmure de dissidence. C'est là sa honte. Puisque cette noble doctrine de l'équité fut reconnue par la Cour suprême du Canada, comment se fait-il que personne d'autre ne l'ait reconnue? Quelle limite fut imposée sur la perception et la conscience juridique de nos juristes pour qu'ils ne possèdent pas une vision qui semble si évidente à la Cour suprême du Canada?

Un des aspects corollaires de cette cause est : lorsqu'il n'y a pas d'équité, cela fait place aux préjugés, à l'arbitraire et à l'injustice. Lisons cet énoncé du par. 48 de l'arrêt *Baker* de la Cour suprême du Canada :

Á mon avis, les membres bien informés de la communauté percevraient la partialité dans les commentaires de l'agent Lorenz. Ses notes, et la façon dont elles sont rédigées, ne témoignent ni d'un esprit ouvert ni d'une *absence de stéréotypes* dans l'évaluation des circonstances particulières de l'affaire. . . . L'utilisation de majuscules par l'agent pour souligner le nombre des enfants de Mme Baker peut également indiquer au lecteur que c'était là une raison de lui refuser sa demande.

[notre emphase]

La savante Juge L'Heureux-Dubé établit la règle de trois appropriée lorsque confrontée à l'application de l'art. 114(2) de la *Loi sur l'immigration* et cette règle est établie simplement sur l'aspect raisonnable de la décision.

Elle détermine qu'il est raisonnable de considérer l'intérêt des enfants de la requérante et que les décideurs ne traitaient pas de cet aspect. Elle énonce, au par. 65 :

. . . j'estime que le défaut d'accorder de l'importance et de la considération à l'intérêt des enfants constitue un exercice déraisonnable du pouvoir discrétionnaire conféré par l'article, même s'il faut exercer un degré élevé de retenue envers la décision de l'agent d'immigration. . . .

Plus loin, au para. 76 :

En conséquence, parce qu'il y a eu manquement aux principes d'quité procédurale en raison d'une crainte raisonnable de partialité, et parce que l'exercice du pouvoir en matière humanitaire était déraisonnable, je suis d'avis d'accueillir le présent pourvoi.

Un autre aspect émanant de l'affaire *Baker* est maintenant plaidé par les avocats du ministère de la justice est à l'effet que les motifs, et bien sûr les notes des CAIPS, peuvent être présentées à titre de preuve. Les avocats du ministère utilisent tous les arguments pour éviter le dépôt d'affidavits lors des demandes de contrôle judiciaire pour ainsi éviter de soumettre les officiers à un contre-interrogatoire.

Cette question fut réglée de façon claire et convaincante par la Cour d'appel dans l'affaire *Wang c. Canada (Ministre de l'Emploi & de l'Immigration)*, 12 Imm. L.R. (2d) 178, 121 N.R. 243, [1991] 2 C.F. 165, 40 F.T.R. 239 (note) (C.A. féd.).

Par contre, pouvons-nous prétendre que la règle établie dans *Wang* est maintenant renversée puisque les notes de Lorenz et des CAIPS furent lues par la Cour dans l'affaire *Baker*? Je soumets que non.

Selon les règles, le requérant peut demander le dépôt du dossier lors d'une demande de contrôle judiciaire et ceci se fait fréquemment. Cet aspect est similaire à la production de documents par les parties lors de procédures devant la Cour supérieure d'une province. Dans ce cas, selon les règles, le défendeur ou le demandeur doit déposer un affidavit à l'effet que les documents produits représentent la totalité des pièces qu'il a en sa possession et qu'il peut produire.

Par ailleurs, le dépôt de documents ne constitue pas de la preuve pour la partie qui les produit puisqu'elle doit en établir la preuve s'ils ne sont pas autrement admis. Cela n'empêche pas l'autre partie au litige de produire ces documents en preuve puisque leur dépôt par l'adversaire constitue une admission.

En conséquence, un requérant peut déposer un tel dossier sans prouver quoi que ce soit. Mais cela ne veut pas dire que l'intimé peut invoquer ce dossier, s'il le désire, pour en établir le contenu. Ceci doit être fait par voie d'affidavit de la part de la personne qui a la connaissance personnelle des faits.

Cecil L. Rotenberg, Q.C.

Table of Authorities

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Preamble — referred to

Article 3 ¶ 1 — considered

Article 3 ¶ 2 — considered

Article 9 ¶ 1 — considered

Article 9 ¶ 2 — considered

Article 9 ¶ 3 — considered

Article 9 ¶ 4 — considered

Article 12 ¶ 1 — considered

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Convention on the Rights of the Child, 1989, G.A. Res. 44/25; [1992] C.T.S. 3; 28 I.L.M. 1456

Generally — considered

Regulations considered by *L'Heureux-Dubé J.* (*Gonthier, McLachlin, Bastarache* and *Binnie JJ.* concurring):

Immigration Act, R.S.C./L.R.C. 1985, c. I-2

Immigration Regulations, 1978, SOR/78-172

s. 2.1 [en. SOR/93-44]

APPEAL by applicant from judgment reported at *Baker v. Canada (Minister of Citizenship & Immigration)* (1996), [1996] F.C.J. No. 1726, [1996] F.C.J. No. 1570, 1996 CarswellNat 2693, 1996 CarswellNat 2052, [1997] 2 F.C. 127, 122 F.T.R. 320 (note), 207 N.R. 57,

142 D.L.R. (4th) 554 (Fed. C.A.), dismissing applicant's appeal from judgment dismissing application for judicial review of immigration officer's refusal of application under s. 114(2) of *Immigration Act* for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada.

POURVOI de la requérante à l'encontre du jugement publié à (1996), 142 D.L.R. (4th) 554, 207 N.R. 57, 122 F.T.R. 320 (note), [1997] 2 F.C. 127 (C.A. Féd.), rejetant l'appel de la requérante du jugement publié à (1995), 31 Imm. L.R. (2d) 150, 101 F.T.R. 110 (C.Féd. (1re inst.)), rejetant sa demande de contrôle judiciaire du refus, par l'agent d'immigration, d'exercer son pouvoir discrétionnaire en vertu du par. 114(2) de la *Loi sur l'immigration* pour des motifs d'ordre humanitaire.

***L'Heureux-Dubé J.* (*Gonthier, McLachlin, Bastarache* and *Binnie JJ.* concurring):**

1 Regulations made pursuant to s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2, empower the respondent Minister to facilitate the admission to Canada of a person where the Minister is satisfied, owing to humanitarian and compassionate considerations, that admission should be facilitated or an exemption from the regulations made under the Act should be granted. At the centre of this appeal is the approach to be taken by a court to judicial review of such decisions, both on procedural and substantive grounds. It also raises issues of reasonable apprehension of bias, the provision of written reasons as part of the duty of fairness, and the role of children's interests in reviewing decisions made pursuant to s. 114(2).

I. Factual Background

2 Mavis Baker is a citizen of Jamaica who entered Canada as a visitor in August of 1981 and has remained in Canada since then. She never received permanent resident status, but supported herself illegally as a live-in domestic worker for 11 years. She has had four children (who are all Canadian citizens) while living in Canada: Paul Brown, born in 1985, twins Patricia and Peter Robinson, born in 1989, and Desmond Robinson, born in 1992. After Desmond was born, Ms. Baker suffered from post-partum psychosis and was diagnosed with paranoid schizophrenia. She applied for welfare at that time. When she was first diagnosed with mental illness, two of her children were placed in the care of their natural father, and the other two were placed in foster care. The two who were in foster care are now again under her care, since her condition has improved.

3 The appellant was ordered deported in December 1992, after it was determined that she had worked illegally in Canada and had overstayed her visitor's visa. In 1993, Ms. Baker applied for an exemption from the requirement to apply for permanent residence outside Canada, based upon humanitarian and compassionate considerations, pursuant to s. 114(2) of the *Immigration Act*. She had the assistance of counsel in filing this application,

and included, among other documentation, submissions from her lawyer, a letter from her doctor, and a letter from a social worker with the Children's Aid Society. The documentation provided indicated that although she was still experiencing psychiatric problems, she was making progress. It also stated that she might become ill again if she were forced to return to Jamaica, since treatment might not be available for her there. Ms. Baker's submissions also clearly indicated that she was the sole caregiver for two of her Canadian-born children, and that the other two depended on her for emotional support and were in regular contact with her. The documentation suggested that she too would suffer emotional hardship if she were separated from them.

4 The response to this request was contained in a letter, dated April 18, 1994, and signed by Immigration Officer M. Caden, stating that a decision had been made that there were insufficient humanitarian and compassionate grounds to warrant processing Ms. Baker's application for permanent residence within Canada. This letter contained no reasons for the decision.

5 Upon request of the appellant's counsel, she was provided with the notes made by Immigration Officer G. Lorenz, which were used by Officer Caden when making his decision. After a summary of the history of the case, Lorenz's notes read as follows:

> PC is unemployed - on Welfare. No income shown - no assets. Has four Cdn.-born children- four other children in Jamaica- HAS A TOTAL OF EIGHT CHILDREN
>
> Says only two children are in her "direct custody". (No info on who has ghe [*sic*] other two).
>
> There is nothing for her in Jamaica - hasn't been there in a long time - no longer close to her children there - no jobs there - she has no skills other than as a domestic - children would suffer - can't take them with her and can't leave them with anyone here. Says has suffered from a mental disorder since '81 - is now an outpatient and is improving. If sent back will have a relapse.
>
> Letter from Children's Aid - they say PC has been diagnosed as a paranoid schizophrenic. - children would suffer if returned -
>
> Letter of Aug. '93 from psychiatrist from Ont. Govm't. Says PC had post-partum psychosis and had a brief episode of psychosis in Jam. when was 25 yrs. old. Is now an out-patient and is doing relatively well - deportation would be an extremely stressful experience.
>
> Lawyer says PS [*sic*] is sole caregiver and single parent of two Cdn born children. Pc's mental condition would suffer a setback if she is deported etc.

> This case is a catastrophy [*sic*]. It is also an indictment of our "system" that the client came as a visitor in Aug. '81, was not ordered deported until Dec. '92 and in APRIL '94 IS STILL HERE!
>
> The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this kind of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.
>
> There is also a potential for violence - see charge of" assault with a weapon" [Capitalization in original.]

6 Following the refusal of her application, Ms. Baker was served, on May 27, 1994, with a direction to report to Pearson Airport on June 17 for removal from Canada. Her deportation has been stayed pending the result of this appeal.

II. Relevant Statutory Provisions and Provisions of International Treaties

7 *Immigration Act*, R.S.C., 1985, c. I-2

> **82.1** (1) An application for judicial review under the *Federal Court Act* with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be commenced only with leave of a judge of the Federal Court — Trial Division.
>
> **83**. (1) A judgment of the Federal Court — Trial Division on an application for judicial review with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be appealed to the Federal Court of Appeal only if the Federal Court — Trial Division has at the time of rendering judgment certified that a serious question of general importance is involved and has stated that question.
>
> **114**. ...
>
> (2) The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

Immigration Regulations, 1978, SOR/78-172, as amemded by SOR/93-44

> 2.1 The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

Convention on the Rights of the Child, Can. T.S. 1992 No. 3

> **Article 3**
>
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
>
> . . . . .
>
> **Article 9**
>
> 1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
>
> 2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
>
> 3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
>
> 4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from

any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

III. Judgments

A. Federal Court -- Trial Division (1995), 101 F.T.R. 110 (Fed. T.D.)

8 Simpson J. delivered oral reasons dismissing the appellant's judicial review application. She held that since there were no reasons given by Officer Caden for his decision, no affidavit was provided, and no reasons were required, she would assume, in the absence of evidence to the contrary, that he acted in good faith and made a decision based on correct principles. She rejected the appellant's argument that the statement in Officer Lorenz's notes that Ms. Baker would be a strain on the welfare system was not supported by the evidence, holding that it was reasonable to conclude from the reports provided that Ms. Baker would not be able to return to work. She held that the language of Officer Lorenz did not raise a reasonable apprehension of bias, and also found that the views expressed in his notes were unimportant, because they were not those of the decision-maker, Officer Caden. She rejected the appellant's argument that the *Convention on the Rights of the Child* mandated that the appellant's interests be given priority in s. 114(2) decisions, holding that the Convention did not apply to this situation, and was not part of domestic law. She also held that the evidence showed the children were a significant factor in the decision-making process. She rejected the appellant's submission that the Convention gave rise to a legitimate expectation that the children's interests would be a primary consideration in the decision.

9 Simpson J. certified the following as a serious question of general importance under s. 83(1) of the *Immigration Act*: "Given that the Immigration Act does not expressly incorporate

the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the Immigration Act?"

B. Federal Court of Appeal (1996), [1997] 2 F.C. 127 (Fed. C.A.)

10 The reasons of the Court of Appeal were delivered by Strayer J.A. He held that pursuant to s. 83(1) of the *Immigration Act*, the appeal was limited to the question certified by Simpson J. He also rejected the appellant's request to challenge the constitutional validity of s. 83(1). Strayer J.A. noted that a treaty cannot have legal effect in Canada unless implemented through domestic legislation, and that the Convention had not been adopted in either federal or provincial legislation. He held that although legislation should be interpreted, where possible, to avoid conflicts with Canada's international obligations, interpreting s. 114(2) to require that the discretion it provides for must be exercised in accordance with the Convention would interfere with the separation of powers between the executive and legislature. He held that such a principle could also alter rights and obligations within the jurisdiction of provincial legislatures. Strayer J.A. also rejected the argument that any articles of the Convention could be interpreted to impose an obligation upon the government to give primacy to the interests of the children in a proceeding such as deportation. He held that the deportation of a parent was not a decision" concerning" children within the meaning of article 3. Finally, Strayer J.A. considered the appellant's argument based on the doctrine of legitimate expectations. He noted that because the doctrine does not create substantive rights, and because a requirement that the best interests of the children be given primacy by a decision-maker under s. 114(2) would be to create a substantive right, the doctrine did not apply.

III. Issues

11 Because, in my view, the issues raised can be resolved under the principles of administrative law and statutory interpretation, I find it unnecessary to consider the various *Charter* issues raised by the appellant and the interveners who supported her position. The issues raised by this appeal are therefore as follows:

> (1) What is the legal effect of a stated question under s. 83(1) of the *Immigration Act* on the scope of appellate review?
>
> (2) Were the principles of procedural fairness violated in this case?
>
> > (i) Were the participatory rights accorded consistent with the duty of procedural fairness?

(ii) Did the failure of Officer Caden to provide his own reasons violate the principles of procedural fairness?

(iii) Was there a reasonable apprehension of bias in the making of this decision?

(3) Was this discretion improperly exercised because of the approach taken to the interests of Ms. Baker's children?

I note that it is the third issue that raises directly the issues contained in the certified question of general importance stated by Simpson J.

IV. Analysis

A. Stated Questions Under s. 83(1) of the Immigration Act

12 The Court of Appeal held, in accordance with its decision in *Liyanagamage v. Canada (Secretary of State)* (1994), 176 N.R. 4 (Fed. C.A.), that the requirement, in s. 83(1), that a serious question of general importance be certified for an appeal to be permitted restricts an appeal court to addressing the issues raised by the certified question. However, in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.) at para. 25, this Court held that s. 83(1) does not require that the Court of Appeal address only the stated question and issues related to it:

> The certification of a "question of general importance" is the trigger by which an appeal is justified. The object of the appeal is still the judgment itself, not the certified question.

Rothstein J. noted in *Ramoutar v. Canada (Minister of Employment & Immigration)*, [1993] 3 F.C. 370 (Fed. T.D.), that once a question has been certified, all aspects of the appeal may be considered by the Court of Appeal, within its jurisdiction. I agree. The wording of s. 83(1) suggests, and *Pushpanathan* confirms, that if a question of general importance has been certified, this allows for an appeal from the judgment of the Trial Division which would otherwise not be permitted, but does not confine the Court of Appeal or this Court to answering the stated question or issues directly related to it. All issues raised by the appeal may therefore be considered here.

B. The Statutory Scheme and the Nature of the Decision

13 Before examining the various grounds for judicial review, it is appropriate to discuss briefly the nature of the decision made under s. 114(2) of the *Immigration Act*, the role of this decision in the statutory scheme, and the guidelines given by the Minister to immigration officers in relation to it.

14 Section 114(2) itself authorizes the Governor in Council to authorize the Minister to exempt a person from a regulation made under the *Act*, or to facilitate the admission to Canada of any person. The Minister's power to grant an exemption based on humanitarian and compassionate (H & C) considerations arises from s. 2.1 of the *Immigration Regulations*, which I reproduce for convenience:

> The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

For the purpose of clarity, I will refer throughout these reasons to decisions made pursuant to the combination of s. 114(2) of the Act and s. 2.1 of the Regulations as "H & C decisions".

15 Applications for permanent residence must, as a general rule, be made from outside Canada, pursuant to s. 9(1) of the Act. One of the exceptions to this is when admission is facilitated owing to the existence of compassionate or humanitarian considerations. In law, pursuant to the *Act* and the regulations, an H & C decision is made by the Minister, though in practice, this decision is dealt with in the name of the Minister by immigration officers: see, for example, *Jiminez-Perez v. Canada (Minister of Employment& Immigration)*, [1984] 2 S.C.R. 565 (S.C.C.), at p. 569. In addition, while in law, the H & C decision is one that provides for an *exemption* from regulations or from the *Act*, in practice, it is one that, in cases like this one, determines whether a person who has been in Canada but does not have status can stay in the country or will be required to leave a place where he or she has become established. It is an important decision that affects in a fundamental manner the future of individuals' lives. In addition, it may also have an important impact on the lives of any Canadian children of the person whose humanitarian and compassionate application is being considered, since they may be separated from one of their parents and/or uprooted from their country of citizenship, where they have settled and have connections.

16 Immigration officers who make H & C decisions are provided with a set of guidelines, contained in chapter 9 of the *Immigration Manual: Examination and Enforcement*. The guidelines constitute instructions to immigration officers about how to exercise the discretion delegated to them. These guidelines are also available to the public. A number of statements in the guidelines are relevant to Ms. Baker's application. Guideline 9.05 emphasizes that officers have a duty to decide which cases should be given a favourable recommendation, by carefully considering all aspects of the case, using their best judgment and asking themselves what a reasonable person would do in such a situation. It also states that although officers are not expected to "delve into areas which are not presented during examination or

interviews, they should attempt to clarify possible humanitarian grounds and public policy considerations even if these are not well articulated".

17 The guidelines also set out the bases upon which the discretion conferred by s. 114(2) and the regulations should be exercised. Two different types of criteria that may lead to a positive s. 114(2) decision are outlined -- public policy considerations and humanitarian and compassionate grounds. Immigration officers are instructed, under guideline 9.07, to assure themselves, first, whether a public policy consideration is present, and if there is none, whether humanitarian and compassionate circumstances exist. Public policy reasons include marriage to a Canadian resident, the fact that the person has lived in Canada, become established, and has become an "illegal de facto resident", and the fact that the person may be a long-term holder of employment authorization or has worked as a foreign domestic. Guideline 9.07 states that humanitarian and compassionate grounds will exist if "unusual, undeserved or disproportionate hardship would be caused to the person seeking consideration if he or she had to leave Canada". The guidelines also directly address situations involving family dependency, and emphasize that the requirement that a person leave Canada to apply from abroad may result in hardship for close family members of a Canadian resident, whether parents, children, or others who are close to the claimant, but not related by blood. They note that in such cases, the reasons why the person did not apply from abroad and the existence of family or other support in the person's home country should also be considered.

C. Procedural Fairness

18 The first ground upon which the appellant challenges the decision made by Officer Caden is the allegation that she was not accorded procedural fairness. She suggests that the following procedures are required by the duty of fairness when parents have Canadian children and they make an H & C application: an oral interview before the decision-maker, notice to her children and the other parent of that interview, a right for the children and the other parent to make submissions at that interview, and notice to the other parent of the interview and of that person's right to have counsel present. She also alleges that procedural fairness requires the provision of reasons by the decision-maker, Officer Caden, and that the notes of Officer Lorenz give rise to a reasonable apprehension of bias.

19 In addressing the fairness issues, I will consider first the principles relevant to the determination of the content of the duty of procedural fairness, and then address Ms. Baker's arguments that she was accorded insufficient participatory rights, that a duty to give reasons existed, and that there was a reasonable apprehension of bias.

20 Both parties agree that a duty of procedural fairness applies to H & C decisions. The fact that a decision is administrative and affects "the rights, privileges or interests of an individual"

is sufficient to trigger the application of the duty of fairness: *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.) at p. 653. Clearly, the determination of whether an applicant will be exempted from the requirements of the Act falls within this category, and it has been long recognized that the duty of fairness applies to H& C decisions: *Sobrie v. Canada (Minister of Employment & Immigration)* (1987), 3 Imm. L.R. (2d) 81 (Fed. T.D.) at p. 88; *Said v. Canada (Minister of Employment & Immigration)* (1992), 6 Admin. L.R. (2d) 23 (Fed. T.D.); *Shah v. Canada (Minister of Employment & Immigration)* (1994), 170 N.R. 238 (Fed. C.A.).

(1) Factors Affecting the Content of the Duty of Fairness

21 The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.) at p. 682, "the concept of procedural fairness is eminently variable, and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight* at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 (S.C.C.), *per* Sopinka J.

22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

23 Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In *Knight*, *supra*, at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. See also *Old St. Boniface*, *supra*, at p. 1191; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (Eng. C.A.) at p. 118; *Syndicat des employés de production du Québec & de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 (S.C.C.) at p. 896, *per* Sopinka J.

24 A second factor is the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates": *Old St. Boniface*, *supra*, at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted: see D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 7-66 to 7-67.

25 A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.) at p. 1113:

> A high standard of justice is required when the right to continue in one's profession or employment is at stake.... A disciplinary suspension can have grave and permanent consequences upon a professional career.

As Sedley J. (now Sedley L.J.) stated in *R. v. Higher Education Funding Council* (1993), [1994] 1 All E.R. 651 (Eng. Q.B.), at p. 667:

> In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin*, [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.

The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.

26 Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface*, *supra*, at p. 1204; *Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525 (S.C.C.) at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty

of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Qi v. Canada (Minister of Citizenship & Immigration)* (1995), 33 Imm. L.R. (2d) 57 (Fed. T.D.); *Mercier-Néron v. Canada (Minister of National Health & Welfare)* (1995), 98 F.T.R. 36 (Fed. T.D.); *Bendahmane v. Canada (Minister of Employment & Immigration)*, [1989] 3 F.C. 16 (Fed. C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: D.J. Mullan, *Administrative Law* (3rd ed. 1996), at pp. 214-15; D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 *J.L. & Soc. Pol'y* 282, at p. 297; *Canada (Attorney General) v. Canada (Human Rights Tribunal)* (1994), 76 F.T.R. 1 (Fed. T.D.). Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

27 Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, *supra*, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *I.W.A. Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 (S.C.C.), *per* Gonthier J.

28 I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

(2) Legitimate Expectations

29 I turn now to an application of these principles to the circumstances of this case, to determine whether the procedures followed respected the duty of procedural fairness. I will first determine whether the duty of procedural fairness that would otherwise be applicable

is affected, as the appellant argues, by the existence of a legitimate expectation based upon the text of the articles of the Convention and the fact that Canada has ratified it. In my view, however, the articles of the Convention and their wording did not give rise to a legitimate expectation on the part of Ms. Baker that when the decision on her H& C application was made, specific procedural rights above what would normally be required under the duty of fairness would be accorded, a positive finding would be made, or particular criteria would be applied. This Convention is not, in my view, the equivalent of a government representation about how H& C applications will be decided, nor does it suggest that any rights beyond the participatory rights discussed below will be accorded. Therefore, in this case there is no legitimate expectation affecting the content of the duty of fairness, and the fourth factor outlined above therefore does not affect the analysis. It is unnecessary to decide whether an international instrument ratified by Canada could, in other circumstances, give rise to a legitimate expectation.

(3) Participatory Rights

30 The next issue is whether, taking into account the other factors related to the determination of the content of the duty of fairness, the failure to accord an oral hearing and give notice to Ms. Baker or her children was inconsistent with the participatory rights required by the duty of fairness in these circumstances. At the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly. The procedure in this case consisted of a written application with supporting documentation, which was summarized by the junior officer (Lorenz), with a recommendation being made by that officer. The summary, recommendation, and material was then considered by the senior officer (Caden), who made the decision.

31 Several of the factors described above enter into the determination of the type of participatory rights the duty of procedural fairness requires in the circumstances. First, an H & C decision is very different from a judicial decision, since it involves the exercise of considerable discretion and requires the consideration of multiple factors. Second, its role is also, within the statutory scheme, as an exception to the general principles of Canadian immigration law. These factors militate in favour of more relaxed requirements under the duty of fairness. On the other hand, there is no appeal procedure, although judicial review may be applied for with leave of the Federal Court — Trial Division. In addition, considering the third factor, this is a decision that in practice has exceptional importance to the lives of those with an interest in its result — the claimant and his or her close family members — and this leads to the content of the duty of fairness being more extensive. Finally, applying the fifth factor described above, the statute accords considerable flexibility to the Minister to decide on the proper procedure, and immigration officers, as a matter of practice, do not conduct interviews in all cases. The institutional practices and choices made by the Minister

are significant, though of course not determinative factors to be considered in the analysis. Thus, it can be seen that although some of the factors suggest stricter requirements under the duty of fairness, others suggest more relaxed requirements further from the judicial model.

32 Balancing these factors, I disagree with the holding of the Federal Court of Appeal in *Shah*, *supra*, at p. 239, that the duty of fairness owed in these circumstances is simply "minimal". Rather, the circumstances require a full and fair consideration of the issues, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.

33 However, it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. The Federal Court has held that procedural fairness does not require an oral hearing in these circumstances: see, for example, *Said*, *supra*, at p. 30.

34 I agree that an oral hearing is not a general requirement for H & C decisions. An interview is not essential for the information relevant to an H& C application to be put before an immigration officer, so that the humanitarian and compassionate considerations presented may be considered in their entirety and in a fair manner. In this case, the appellant had the opportunity to put forward, in written form through her lawyer, information about her situation, her children and their emotional dependence on her, and documentation in support of her application from a social worker at the Children's Aid Society and from her psychiatrist. These documents were before the decision-makers, and they contained the information relevant to making this decision. Taking all the factors relevant to determining the content of the duty of fairness into account, the lack of an oral hearing or notice of such a hearing did not, in my opinion, constitute a violation of the requirements of procedural fairness to which Ms. Baker was entitled in the circumstances, particularly given the fact that several of the factors point toward a more relaxed standard. The opportunity, which was accorded, for the appellant or her children to produce full and complete written documentation in relation to all aspects of her application satisfied the requirements of the participatory rights required by the duty of fairness in this case.

(4) The Provision of Reasons

35 The appellant also submits that the duty of fairness, in these circumstances, requires that reasons be given by the decision-maker. She argues either that the notes of Officer Lorenz should be considered the reasons for the decision, or that it should be held that the failure of Officer Caden to give written reasons for his decision or a subsequent affidavit explaining them should be taken to be a breach of the principles of fairness.

36 This issue has been addressed in several cases of judicial review of humanitarian and compassionate applications. The Federal Court of Appeal has held that reasons are unnecessary: *Shah*, *supra*, at pp. 239-40. It has also been held that the case history notes prepared by a subordinate officer are not to be considered the decision-maker's reasons: see *Tylo v. Canada (Minister of Employment & Immigration)* (1995), 90 F.T.R. 157 (Fed. T.D.) at pp. 159-60. In *Gheorlan v. Canada (Secretary of State)* (1995), 26 Imm. L.R. (2d) 170 (Fed. T.D.), and *Chan v. Canada (Minister of Citizenship & Immigration)* (1994), 87 F.T.R. 62 (Fed. T.D.), it was held that the notes of the reviewing officer should not be taken to be the reasons for decision, but may help in determining whether a reviewable error exists. In *Marques v. Canada (Minister of Citizenship & Immigration)* (1995), 116 F.T.R. 241 (Fed. T.D.), an H & C decision was set aside because the decision making officer failed to provide reasons or an affidavit explaining the reasons for his decision.

37 More generally, the traditional position at common law has been that the duty of fairness does not require, as a general rule, that reasons be provided for administrative decisions: *Northwestern Utilities Ltd. v. Edmonton (City)* (1978), [1979] 1 S.C.R. 684 (S.C.C.); *Supermarchés Jean Labrecque Inc. v. Québec (Tribunal du travail)*, [1987] 2 S.C.R. 219 (S.C.C.) at p. 233; *Public Service Board of New South Wales v. Osmond* (1986), 159 C.L.R. 656 (Australia H.C.) at pp. 665-66.

38 Courts and commentators have, however, often emphasized the usefulness of reasons in ensuring fair and transparent decision-making. Though *Northwestern Utilities* dealt with a statutory obligation to give reasons, Estey J. held as follows, at p. 706, referring to the desirability of a common law reasons requirement:

> This obligation is a salutary one. It reduces to a considerable degree the chances of arbitrary or capricious decisions, reinforces public confidence in the judgment and fairness of administrative tribunals, and affords parties to administrative proceedings an opportunity to assess the question of appeal....

The importance of reasons was recently reemphasized by this Court in *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.) at pp. 109-10.

39 Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review: R.A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123, at p. 146; *Williams v. Canada (Minister of Citizenship & Immigration)*, [1997] 2 F.C. 646 (Fed. C.A.) at para. 38 Those affected may be more likely to feel they were treated

fairly and appropriately if reasons are given: de Smith, Woolf, & Jowell, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. I agree that these are significant benefits of written reasons.

40 Others have expressed concerns about the desirability of a written reasons requirement at common law. In *Osmond*, *supra*, Gibbs C.J. articulated, at p. 668, the concern that a reasons requirement may lead to an inappropriate burden being imposed on administrative decision-makers, that it may lead to increased cost and delay, and that it" might in some cases induce a lack of candour on the part of the administrative officers concerned". Macdonald and Lametti, *supra*, though they agree that fairness should require the provision of reasons in certain circumstances, caution against a requirement of "archival" reasons associated with court judgments, and note that the special nature of agency decision-making in different contexts should be considered in evaluating reasons requirements. In my view, however, these concerns can be accommodated by ensuring that any reasons requirement under the duty of fairness leaves sufficient flexibility to decision-makers by accepting various types of written explanations for the decision as sufficient.

41 In England, a common law right to reasons in certain circumstances has developed in the case law: see M.H. Morris, "Administrative Decision-makers and the Duty to Give Reasons: An Emerging Debate" (1997), 11 *C.J.A.L.P.* 155, at pp. 164-168; de Smith, Woolf & Jowell, *supra*, at pp. 462-65. In *R. v. Civil Service Appeal Board*, [1991] 4 All E.R. 310 (Eng. C.A.), reasons were required of a board deciding the appeal of the dismissal of a prison official. The House of Lords, in *R. v. Secretary of State for the Home Department* (1993), [1994] 1 A.C. 531 (U.K. H.L.), imposed a reasons requirement on the Home Secretary when exercising the statutory discretion to decide on the period of imprisonment that a prisoner who had been imposed a life sentence should serve before being entitled to a review. Lord Mustill, speaking for all the law lords on the case, held that although there was no general duty to give reasons at common law, in those circumstances a failure to give reasons was unfair. Other English cases have held that reasons are required at common law when there is a statutory right of appeal: see *Norton Tool Co. v. Tewson*, [1973] 1 W.L.R. 45 (N.I.R.C.) at p. 49; *Alexander Machinery (Dudley) Ltd. v. Crabtree*, [1974] I.C.R. 120 (N.I.R.C.).

42 Some Canadian courts have imposed, in certain circumstances, a common law obligation on administrative decision-makers to provide reasons, while others have been more reluctant. In *Orlowski v. British Columbia (Attorney General)* (1992), 94 D.L.R. (4th) 541 (B.C. C.A.) at pp. 551-52, it was held that reasons would generally be required for decisions of a review board under Part XX.1 of the *Criminal Code*, based in part on the existence of a statutory right of appeal from that decision, and also on the importance of the interests affected by the decision. In *R.D.R. Construction Ltd. v. Nova Scotia (Rent Review Commission)* (1982), 55 N.S.R. (2d) 71 (N.S. T.D.), the court also held that because of the existence of a statutory right of appeal, there was an implied duty to give reasons. Smith

D.J., in *Taabea v. Canada (Refugee Status Advisory Committee)* (1979), [1980] 2 F.C. 316 (Fed. T.D.), imposed a reasons requirement on a Ministerial decision relating to refugee status, based upon the right to apply to the Immigration Appeal Board for redetermination. Similarly, in the context of evaluating whether a statutory reasons requirement had been adequately fulfilled in *Boyle v. New Brunswick (Workplace Health, Safety & Compensation Commission)* (1996), 179 N.B.R. (2d) 43 (N.B. C.A.), Bastarache J.A. (as he then was) emphasized, at p. 55, the importance of adequate reasons when appealing a decision. However, the Federal Court of Appeal recently rejected the submission that reasons were required in relation to a decision to declare a permanent resident a danger to the public under s. 70(5) of the *Immigration Act*: *Williams*, *supra*.

43 In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H& C decision to those affected, as with those at issue in *Orlowski*, *R. v. Civil Service Appeal Board*, and *R. v. Secretary of State for the Home Department*, militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.

44 In my view, however, the reasons requirement was fulfilled in this case, since the appellant was provided with the notes of Officer Lorenz. The notes were given to Ms. Baker when her counsel asked for reasons. Because of this, and because there is no other record of the reasons for making the decision, the notes of the subordinate reviewing officer should be taken, by inference, to be the reasons for decision. Accepting documents such as these notes as sufficient reasons is part of the flexibility that is necessary, as emphasized by Macdonald and Lametti, *supra*, when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways. I conclude that the notes of Officer Lorenz satisfy the requirement for reasons under the duty of procedural fairness in this case, and they will be taken to be the reasons for decision.

(5) Reasonable Apprehension of Bias

45 Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias, by an impartial decision-maker. The respondent argues that Simpson J. was correct to find that the notes of Officer Lorenz cannot be considered to give rise to a reasonable apprehension of bias because it was Officer Caden who was the actual decision-maker, who was simply reviewing the recommendation prepared by his subordinate. In my opinion, the duty to act fairly and therefore in a manner that does not give rise to a reasonable apprehension of bias applies to all immigration officers who play a significant role in the making of decisions, whether they are subordinate reviewing officers, or those who make the final decision. The subordinate officer plays an important part in the process, and if a person with such a central role does not act impartially, the decision itself cannot be said to have been made in an impartial manner. In addition, as discussed in the previous section, the notes of Officer Lorenz constitute the reasons for the decision, and if they give rise to a reasonable apprehension of bias, this taints the decision itself.

46 The test for reasonable apprehension of bias was set out by de Grandpré J., writing in dissent, in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.) at p. 394:

> ...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... [T]hat test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

This expression of the test has often been endorsed by this Court, most recently in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.) at para. 11, *per* Major J.; at para. 31, *per* L'Heureux-Dubé and McLachlin JJ.; and at para. 111, *per* Cory J.

47 It has been held that the standards for reasonable apprehension of bias may vary, like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision-maker involved: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (S.C.C.); *Old St. Boniface*, *supra*, at p. 1192. The context here is one where immigration officers must regularly make decisions that have great importance to the individuals affected by them, but are also often critical to the interests of Canada as a country. They are individualized, rather than decisions of a general nature. They also require special sensitivity. Canada is a nation made up largely of people whose families migrated here in recent centuries. Our history is one that shows the importance of immigration, and our society shows the benefits of having a diversity of people whose origins are in a multitude of places around the world. Because

they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference.

48 In my opinion, the well-informed member of the community would perceive bias when reading Officer Lorenz's comments. His notes, and the manner in which they are written, do not disclose the existence of an open mind or a weighing of the particular circumstances of the case free from stereotypes. Most unfortunate is the fact that they seem to make a link between Ms. Baker's mental illness, her training as a domestic worker, the fact that she has several children, and the conclusion that she would therefore be a strain on our social welfare system for the rest of her life. In addition, the conclusion drawn was contrary to the psychiatrist's letter, which stated that, with treatment, Ms. Baker could remain well and return to being a productive member of society. Whether they were intended in this manner or not, these statements give the impression that Officer Lorenz may have been drawing conclusions based not on the evidence before him, but on the fact that Ms. Baker was a single mother with several children, and had been diagnosed with a psychiatric illness. His use of capitals to highlight the number of Ms. Baker's children may also suggest to a reader that this was a reason to deny her status. Reading his comments, I do not believe that a reasonable and well-informed member of the community would conclude that he had approached this case with the impartiality appropriate to a decision made by an immigration officer. It would appear to a reasonable observer that his own frustration with the "system" interfered with his duty to consider impartially whether the appellant's admission should be facilitated owing to humanitarian or compassionate considerations. I conclude that the notes of Officer Lorenz demonstrate a reasonable apprehension of bias.

D. Review of the Exercise of the Minister's Discretion

49 Although the finding of reasonable apprehension of bias is sufficient to dispose of this appeal, it does not address the issues contained in the "serious question of general importance" which was certified by Simpson J. relating to the approach to be taken to children's interests when reviewing the exercise of the discretion conferred by the Act and the regulations. Since it is important to address the central questions which led to this appeal, I will also consider whether, as a substantive matter, the H & C decision was improperly made in this case.

50 The appellant argues that the notes provided to Ms. Baker show that, as a matter of law, the decision should be overturned on judicial review. She submits that the decision should be held to a standard of review of correctness, that principles of administrative law require this discretion to be exercised in accordance with the Convention, and that the Minister should apply the best interests of the child as a primary consideration in H & C decisions. The

respondent submits that the Convention has not been implemented in Canadian law, and that to require that s. 114(2) and the regulations made under it be interpreted in accordance with the Convention would be improper, since it would interfere with the broad discretion granted by Parliament, and with the division of powers between the federal and provincial governments.

(1) The Approach to Review of Discretionary Decision-Making

51 As stated earlier, the legislation and regulations delegate considerable discretion to the Minister in deciding whether an exemption should be granted based upon humanitarian and compassionate considerations. The regulations state that "[t]he Minister *is ... authorized to*" grant an exemption or otherwise facilitate the admission to Canada of any person "*where the Minister is satisfied* that" this should be done "owing to the existence of compassionate or humanitarian considerations". This language signals an intention to leave considerable choice to the Minister on the question of whether to grant an H & C application.

52 The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. As K.C. Davis wrote in *Discretionary Justice* (1969), at p. 4:

> A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.

It is necessary in this case to consider the approach to judicial review of administrative discretion, taking into account the "pragmatic and functional" approach to judicial review that was first articulated in *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. Union des employés de service, local 298*, [1988] 2 S.C.R. 1048 (S.C.C.) and has been applied in subsequent cases including *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.) at pp. 601-7, *per* L'Heureux-Dubé J., dissenting, but not on this issue; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.); *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.); and *Pushpanathan*, *supra*.

53 Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations: see, for example, *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 (S.C.C.) at pp. 7-8; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 (S.C.C.). A general doctrine of "unreasonableness" has also sometimes been applied to discretionary decisions: *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* (1947), [1948] 1 K.B. 223 (Eng. C.A.). In my opinion, these doctrines

incorporate two central ideas — that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manouevre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.)), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.)).

54 It is, however, inaccurate to speak of a rigid dichotomy of "discretionary" or "non-discretionary" decisions. Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making. To give just one example, decision-makers may have considerable discretion as to the remedies they order. In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options. As stated by Brown and Evans, *supra*, at p. 14-47:

> The degree of discretion in a grant of power can range from one where the decision-maker is constrained only by the purposes and objects of the legislation, to one where it is so specific that there is almost no discretion involved. In between, of course, there may be any number of limitations placed on the decision-maker's freedom of choice, sometimes referred to as" structured" discretion.

55 The "pragmatic and functional" approach recognizes that standards of review for errors of law are appropriately seen as a spectrum, with certain decisions being entitled to more deference, and others entitled to less: *Pezim*, *supra*, at pp. 589-90; *Southam*, *supra*, at para. 30; *Pushpanathan*, *supra*, at para. 27. Three standards of review have been defined: patent unreasonableness, reasonableness *simpliciter*, and correctness: *Southam*, at paras. 54-56. In my opinion the standard of review of the substantive aspects of discretionary decisions is best approached within this framework, especially given the difficulty in making rigid classifications between discretionary and non-discretionary decisions. The pragmatic and functional approach takes into account considerations such as the expertise of the tribunal, the nature of the decision being made, and the language of the provision and the surrounding legislation. It includes factors such as whether a decision is "polycentric" and the intention revealed by the statutory language. The amount of choice left by Parliament to the

administrative decision-maker and the nature of the decision being made are also important considerations in the analysis. The spectrum of standards of review can incorporate the principle that in certain cases, the legislature has demonstrated its intention to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power accorded by Parliament. Finally, I would note that this Court has already applied this framework to statutory provisions that confer significant choices on administrative bodies, for example, in reviewing the exercise of the remedial powers conferred by the statute at issue in *Southam*, *supra*.

56 Incorporating judicial review of decisions that involve considerable discretion into the pragmatic and functional analysis for errors of law should not be seen as reducing the level of deference given to decisions of a highly discretionary nature. In fact, deferential standards of review may give substantial leeway to the discretionary decision-maker in determining the" proper purposes" or "relevant considerations" involved in making a given determination. The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options. However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

(2) The Standard of Review in This Case

57 I turn now to an application of the pragmatic and functional approach to determine the appropriate standard of review for decisions made under s. 114(2) and Regulation 2.1, and the factors affecting the determination of that standard outlined in *Pushpanathan*, *supra*. It was held in that case that the decision, which related to the determination of a question of law by the Immigration and Refugee Board, was subject to a standard of review of correctness. Although that decision was also one made under the *Immigration Act*, the type of decision at issue was very different, as was the decision-maker. The appropriate standard of review must, therefore, be considered separately in the present case.

58 The first factor to be examined is the presence or absence of a privative clause, and, in appropriate cases, the wording of that clause: *Pushpanathan*, at para. 30. There is no privative clause contained in the *Immigration Act*, although judicial review cannot be commenced without leave of the Federal Court — Trial Division under s. 82.1. As mentioned above, s. 83(1) requires the certification of a serious question of general importance by the Federal Court — Trial Division before that decision may be appealed to the Court of Appeal. *Pushpanathan* shows that the existence of this provision means there should be a lower level of deference on issues related to the certified question itself. However, this is only one of

the factors involved in determining the standard of review, and the others must also be considered.

59 The second factor is the expertise of the decision-maker. The decision-maker here is the Minister of Citizenship and Immigration or his or her delegate. The fact that the formal decision-maker is the Minister is a factor militating in favour of deference. The Minister has some expertise relative to courts in immigration matters, particularly with respect to when exemptions should be given from the requirements that normally apply.

60 The third factor is the purpose of the provision in particular, and of the Act as a whole. This decision involves considerable choice on the part of the Minister in determining when humanitarian and compassionate considerations warrant an exemption from the requirements of the Act. The decision also involves applying relatively "open-textured" legal principles, a factor militating in favour of greater deference: *Pushpanathan*, *supra*, at para. 36. The purpose of the provision in question is also to *exempt* applicants, in certain circumstances, from the requirements of the Act or its regulations. This factor, too, is a signal that greater deference should be given to the Minister. However, it should also be noted, in favour of a stricter standard, that this decision relates directly to the rights and interests of an individual in relation to the government, rather than balancing the interests of various constituencies or mediating between them. Its purpose is to decide whether the admission to Canada of a particular individual, in a given set of circumstances, should be facilitated.

61 The fourth factor outlined in *Pushpanathan* considers the nature of the problem in question, especially whether it relates to determination of law or facts. The decision about whether to grant an H & C exemption involves a considerable appreciation of the facts of that person's case, and is not one which involves the application or interpretation of definitive legal rules. Given the highly discretionary and fact-based nature of this decision, this is a factor militating in favour of deference.

62 These factors must be balanced to arrive at the appropriate standard of review. I conclude that considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court — Trial Division and the Federal Court of Appeal in certain circumstances, and the individual rather than polycentric nature of the decision, also suggest that the standard should not be as deferential as "patent unreasonableness". I conclude, weighing all these factors, that the appropriate standard of review is reasonableness *simpliciter*.

(3) Was this Decision Unreasonable?

63 I will next examine whether the decision in this case, and the immigration officer's interpretation of the scope of the discretion conferred upon him, was unreasonable in the sense contemplated in the judgment of Iacobucci J. in *Southam*, *supra*, at para. 56:

> An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it.

In particular, the examination of this question should focus on the issues arising from the serious question of general importance stated by Simpson J.: the question of the approach to be taken to the interests of children when reviewing an H & C decision.

64 The notes of Officer Lorenz, in relation to the consideration of "H&C factors", read as follows:

> The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. So we let her stay because of that? I am of the opinion that Canada can no longer afford this kind of generosity.

65 In my opinion, the approach taken to the children's interests shows that this decision was unreasonable in the sense contemplated in *Southam*, *supra*. The officer was completely dismissive of the interests of Ms. Baker's children. As I will outline in detail in the paragraphs that follow, I believe that the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer. Professor Dyzenhaus has articulated the concept of "deference as respect" as follows:

> Deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision...
>
> (D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.)

The reasons of the immigration officer show that his decision was inconsistent with the values underlying the grant of discretion. They therefore cannot stand up to the somewhat probing examination required by the standard of reasonableness.

66 The wording of s. 114(2) and of regulation 2.1 requires that a decision-maker exercise the power based upon "*compassionate* or *humanitarian* considerations" (emphasis added). These words and their meaning must be central in determining whether an individual H & C decision was a reasonable exercise of the power conferred by Parliament. The legislation and regulations direct the Minister to determine whether the person's admission should be facilitated owing to the existence of such considerations. They show Parliament's intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner. This Court has found that it is necessary for the Minister to *consider* an H & C request when an application is made: *Jiminez-Perez*, *supra*. Similarly, when considering it, the request must be evaluated in a manner that is respectful of humanitarian and compassionate considerations.

67 Determining whether the approach taken by the immigration officer was within the boundaries set out by the words of the statute and the values of administrative law requires a contextual approach, as is taken to statutory interpretation generally: see *R. v. Gladue*, [1999] 1 S.C.R. 688 (S.C.C.); *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at paras. 20-23. In my opinion, a reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children. Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of children's interests as important considerations governing the manner in which H& C powers should be exercised may be found, for example, in the purposes of the Act, in international instruments, and in the guidelines for making H & C decisions published by the Minister herself.

(a) The Objectives of the Act

68 The objectives of the Act include, in s. 3(*c*):

> to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad;

Although this provision speaks of Parliament's objective of *reuniting* citizens and permanent residents with their close relatives from abroad, it is consistent, in my opinion, with a large and liberal interpretation of the values underlying this legislation and its purposes to presume that Parliament also placed a high value on keeping citizens and permanent residents together with their close relatives who are already in Canada. The obligation to take seriously and place important weight on keeping children in contact with both parents, if possible,

and maintaining connections between close family members is suggested by the objective articulated in s. 3(*c*).

(b) International Law

69 Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the *Convention on the Rights of the Child*, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada. International treaties and conventions are not part of Canadian law unless they have been implemented by statute: *Francis v. R.*, [1956] S.C.R. 618 (S.C.C.) at p. 621; *Capital Cities Communications Inc. v. Canada (Radio-Television & Telecommunications Commission)* (1977), [1978] 2 S.C.R. 141 (S.C.C.) at pp. 172-73. I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.

70 Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

> [T]he legislature is presumed to respect the values and principles contained in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]

The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries: see, for example, *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (New Zealand C.A.) at p. 266; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361 (S.C. India) at p. 367. It is also a critical influence on the interpretation of the scope of the rights included in the *Charter*: *Slaight Communications*, *supra*; *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.).

71 The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the Universal Declaration of Human Rights, recognizes that "childhood is entitled to special care and assistance". A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations *Declaration of the Rights of the Child* (1959), in its preamble, states that the child "needs special safegards and care". The principles of the Convention and other international instrumnts place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values

that are central in determining whether this decision was a reasonable exercise of the H & C power.

(c) The Ministerial Guidelines

72 Third, the guidelines issued by the Minister to immigration officers recognize and reflect the values and approach discussed above and articulated in the Convention. As described above, immigration officers are expected to make the decision that a reasonable person would make, with special consideration of humanitarian values such as keeping connections between family members and avoiding hardship by sending people to places where they no longer have connections. The guidelines show what the Minister considers a humanitarian and compassionate decision, and they are of great assistance to the Court in determining whether the reasons of Officer Lorenz are supportable. They emphasize that the decision-maker should be alert to possible humanitarian grounds, should consider the hardship that a negative decision would impose upon the claimant or close family members, and should consider as an important factor the connections between family members. The guidelines are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section, and the fact that this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H & C power.

73 The above factors indicate that emphasis on the rights, interests, and needs of children and special attention to childhood are important values that should be considered in reasonably interpreting the "humanitarian" and" compassionate" considerations that guide the exercise of the discretion. I conclude that because the reasons for this decision do not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of Ms. Baker's children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation, and must, therefore, be overturned. In addition, the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to Jamaica might cause Ms. Baker, given the fact that she had been in Canada for 12 years, was ill and might not be able to obtain treatment in Jamaica, and would necessarily be separated from at least some of her children.

74 It follows that I disagree with the Federal Court of Appeal's holding in *Shah*, *supra*, at p. 239, that a s. 114(2) decision is "*wholly* a matter of judgment and discretion" (emphasis added). The wording of s. 114(2) and of the regulations shows that the discretion granted is confined within certain boundaries. While I agree with the Court of Appeal that the Act gives the applicant no right to a particular outcome or to the application of a particular legal test, and that the doctrine of legitimate expectations does not mandate a result consistent with the wording of any international instruments, the decision must be made following an approach that respects humanitarian and compassionate values. Therefore, attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to

the hardship that may be caused to them by a negative decision is essential for an H & C decision to be made in a reasonable manner. While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values. The Minister's guidelines themselves reflect this approach. However, the decision here was inconsistent with it.

75 The certified question asks whether the best interests of children must be a primary consideration when assessing an applicant under s. 114(2) and the regulations. The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

E. Conclusions and Disposition

76 Therefore, both because there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias, and because the exercise of the H & C discretion was unreasonable, I would allow this appeal.

77 The appellant requested that solicitor-client costs be awarded to her if she were successful in her appeal. The majority of this Court held as follows in *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) at p. 134:

> Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

There has been no such conduct on the part of the Minister shown during this litigation, and I do not believe that this is one of the exceptional cases where solicitor-client costs should be awarded. I would allow the appeal, and set aside the decision of Officer Caden of April 18, 1994, with party-and-party costs throughout. The matter will be returned to the Minister for redetermination by a different immigration officer.

***Iacobucci J.* (*Cory J.* concurring):**

78 I agree with L'Heureux-Dubé J.'s reasons and disposition of this appeal, except to the extent that my colleague addresses the effect of international law on the exercise of Ministerial discretion pursuant to s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2. The certified

question at issue in this appeal concerns whether federal immigration authorities must treat the best interests of the child as a primary consideration in assessing an application for humanitarian and compassionate consideration under s. 114(2) of the Act, given that the legislation does not implement the provisions contained in the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, a multilateral convention to which Canada is party. In my opinion, the certified question should be answered in the negative.

79 It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation: *Capital Cities Communications Inc. v. Canada (Radio-Television & Telecommunications Commission)* (1977), [1978] 2 S.C.R. 141 (S.C.C.). I do not agree with the approach adopted by my colleague, wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law, because such an approach is not in accordance with the Court's jurisprudence concerning the status of international law within the domestic legal system

80 In my view, one should proceed with caution in deciding matters of this nature, lest we adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch. I do not share my colleague's confidence that the Court's precedent in *Capital Cities*, *supra*, survives intact following the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation. Instead, the result will be that the appellant is able to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament

81 The primacy accorded to the rights of children in the Convention, assuming for the sake of argument that the factual circumstances of this appeal are included within the scope of the relevant provisions, is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament. In answering the certified question in the negative, I am mindful that the result may well have been different had my collegue concluded that the appellant's claim fell within the ambit of rights protected by the *Canadian Charter of Rights and Freedoms*. Had this been the case, the Court would have had an opportunity to consider the application of the interpretive presumption, established by the Court's decision in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.), and confirmed in subsequent jurisprudence, that administrative discretion involving *Charter* rights be exercised in accordance with similar international human rights norms.

Appeal allowed.

Pourvoi accueilli.

TAB 3

Most Negative Treatment: Distinguished
Most Recent Distinguished: Dickhout v. British Columbia (Police Complaint Commissioner) | 2011 BCSC 880, 2011 CarswellBC 1703, 204 A.C.W.S. (3d) 649, [2011] B.C.W.L.D. 7303, 31 Admin. L.R. (5th) 96 | (B.C. S.C., Jun 30, 2011)

2008 SCC 23
Supreme Court of Canada

United States v. Lake

2008 CarswellOnt 2574, 2008 CarswellOnt 2575, 2008 SCC 23, [2008] 1 S.C.R. 761, [2008] S.C.J. No. 23, 171 C.R.R. (2d) 280, 230 C.C.C. (3d) 449, 236 O.A.C. 371, 292 D.L.R. (4th) 193, 373 N.R. 339, 56 C.R. (6th) 336, 72 Admin. L.R. (4th) 30, 77 W.C.B. (2d) 304, J.E. 2008-970

Talib Steven Lake, Appellant v. Canada (Minister of Justice), Respondent

McLachlin C.J.C., Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein JJ.

Heard: December 6, 2007
Judgment: May 8, 2008
Docket: 31631

Proceedings: affirming *United States v. Lake* (2006), 145 C.R.R. (2d) 156, 2006 CarswellOnt 5346, 212 C.C.C. (3d) 51 (Ont. C.A.)

Counsel: John Norris, for Appellant
Robert J. Frater, Jeffrey G. Johnston, for Respondent

Subject: Criminal; Constitutional; Public; Human Rights
Related Abridgment Classifications
Criminal law
IV Charter of Rights and Freedoms
IV.11 Mobility rights [s. 6]
Criminal law
XXXVIII Extradition
XXXVIII.1 Extradition from Canada
XXXVIII.1.g Order for surrender

Criminal law
XXXVIII Extradition
XXXVIII.1 Extradition from Canada
XXXVIII.1.m Judicial review

Headnote

Criminal law --- Extradition proceedings — Extradition from Canada — Order for surrender
Accused sold crack cocaine to undercover officer in Ontario and once in Detroit, Michigan — Accused charged in Ontario with six offences in relation to transactions, including that he had conspired to traffic in controlled substance over relevant period of time — Accused not charged with offence of trafficking in relation to Detroit transaction — Accused pleaded guilty and sentenced to three years' imprisonment in addition to eight months spent in pre-trial custody — Crown counsel agreed to joint submission of three years because indictment had been issued against accused in U.S. and accused would likely serve time there in addition to Canadian sentence — After accused served Canadian jail sentence, U.S. requested that he be extradited — Accused committed for surrender and Minister of Justice ordered his surrender — Minister found that surrender would not unjustifiably infringe accused's rights under s. 6(1) of Canadian Charter of Rights and Freedoms — Accused's application for judicial review was dismissed — Accused appealed — Appeal dismissed — Minister identified proper test and provided sufficient reasons for decision to order accused's surrender — It was reasonable for Minister to conclude that accused's extradition to U.S. constituted justifiable infringement of his s. 6(1) Charter rights — It was reasonable for Minister to conclude that accused had not already been punished for conduct underlying U.S. indictment — Minister's analysis was sufficient — Explanation based on what Minister considers most persuasive factors is sufficient for reviewing court to determine whether his conclusion was reasonable — Minister's deference to U.S. owing to fact that alleged conduct occurred within its territory provided sufficient basis for concluding that his decision was reasonable.

Criminal law --- Charter of Rights and Freedoms — Mobility rights [s. 6]

Accused sold crack cocaine to undercover officer in Ontario and once in Detroit, Michigan — Accused charged in Ontario with six offences in relation to transactions, including that he had conspired to traffic in controlled substance over relevant period of time — Accused not charged with offence of trafficking in relation to Detroit transaction — Accused pleaded guilty and sentenced to three years' imprisonment in addition to eight months spent in pre-trial custody — Crown counsel agreed to joint submission of three years because indictment had been issued against accused in U.S. and accused would likely serve time there in addition to Canadian sentence — After accused served Canadian jail sentence, U.S. requested that he be extradited — Accused committed for surrender and Minister of Justice ordered his surrender — Minister found that surrender would not unjustifiably infringe accused's rights under s. 6(1) of Canadian Charter of Rights and Freedoms — Accused's application for judicial review was dismissed — Accused appealed — Appeal dismissed — It was reasonable for Minister to conclude that accused's extradition to U.S. constituted

justifiable infringement of his s. 6(1) Charter rights — It was reasonable for Minister to conclude that accused had not already been punished for conduct underlying U.S. indictment — Minister's analysis was sufficient — Minister's deference to U.S. owing to fact that alleged conduct occurred within its territory provided sufficient basis for concluding that his decision was reasonable.

Criminal law --- Extradition proceedings — Extradition from Canada — Remedies following disposition — Judicial review

Appropriate standard of review of Minister's decision to order surrender is reasonableness, regardless of whether or not fugitive argues that extradition would infringe his or her rights under Canadian Charter of Rights and Freedoms.

Droit criminel --- Procédures d'extradition — Extradition à partir du Canada — Ordonnance d'extradition

Accusé a vendu du crack et de la cocaïne à un agent d'infiltration en Ontario et une fois à Detroit (Michigan) — Accusé a été inculpé en Ontario de six infractions en lien avec ces opérations, dont celle de complot en vue de faire le trafic d'une substance désignée au cours de la période de temps en cause — Accusé n'a pas été accusé de l'infraction de trafic en lien avec l'opération effectuée à Detroit — Accusé a inscrit des plaidoyers de culpabilité et a été condamné à purger un total de trois ans d'emprisonnement, en sus des huit mois purgés en détention préventive — Ministère public a convenu avec l'exposé conjoint des faits recommandant une peine de trois ans parce qu'un acte d'accusation avait été déposé à l'encontre de l'accusé aux États-Unis et l'accusé y purgerait une peine d'emprisonnement en sus de celle infligée au Canada — Après que l'accusé eut purgé sa peine d'emprisonnement au Canada, les États-Unis ont demandé son extradition — Accusé a été incarcéré en vue de son extradition et le ministre de la Justice a ordonné son extradition — Selon le ministre, l'extradition ne porterait pas indûment atteinte aux droits de l'accusé suivant l'art. 6(1) de la Charte canadienne des droits et libertés — Demande de contrôle judiciaire de l'accusé a été rejetée — Accusé a formé un pourvoi — Pourvoi rejeté — Ministre a identifié le critère approprié et sa décision d'ordonner l'extradition de l'accusé était suffisamment motivée — Ministre pouvait raisonnablement conclure que l'extradition de l'accusé vers les États-Unis constituait une atteinte injustifiée à ses droits garantis à l'art. 6(1) de la Charte — Ministre pouvait raisonnablement conclure que l'accusé n'avait pas encore été puni pour les faits à l'origine de l'accusation portée aux États-Unis — Analyse du ministre était suffisante — Une justification axée sur les facteurs jugés plus décisifs permet à la cour de révision de statuer sur la raisonnabilité de la conclusion — Fait que le ministre a jugé préférable de respecter l'intérêt prioritaire des États-Unis parce que les actes reprochés ont eu lieu dans ce pays constituait un motif suffisant de conclure à la raisonnabilité de sa décision.

Droit criminel --- Charte des droits et libertés — Liberté de circulation et d'établissement [art. 6]

Accusé a vendu du crack et de la cocaïne à un agent d'infiltration en Ontario et une fois à Detroit (Michigan) — Accusé a été inculpé en Ontario de six infractions en lien avec ces

opérations, dont celle de complot en vue de faire le trafic d'une substance désignée au cours de la période de temps en cause — Accusé n'a pas été accusé de l'infraction de trafic en lien avec l'opération effectuée à Detroit — Accusé a inscrit des plaidoyers de culpabilité et a été condamné à purger un total de trois ans d'emprisonnement, en sus des huit mois purgés en détention préventive — Ministère public a convenu avec l'exposé conjoint des faits recommandant une peine de trois ans parce qu'un acte d'accusation avait été déposé à l'encontre de l'accusé aux États-Unis et l'accusé y purgerait une peine d'emprisonnement en sus de celle infligée au Canada — Après que l'accusé eut purgé sa peine d'emprisonnement au Canada, les États-Unis ont demandé son extradition — Accusé a été incarcéré en vue de son extradition et le ministre de la Justice a ordonné son extradition — Selon le ministre, l'extradition ne porterait pas indûment atteinte aux droits de l'accusé suivant l'art. 6(1) de la Charte canadienne des droits et libertés — Demande de contrôle judiciaire de l'accusé a été rejetée — Accusé a formé un pourvoi — Pourvoi rejeté — Ministre pouvait raisonnablement conclure que l'extradition de l'accusé vers les États-Unis constituait une atteinte injustifiée à ses droits garantis à l'art. 6(1) de la Charte — Ministre pouvait raisonnablement conclure que l'accusé n'avait pas encore été puni pour les faits à l'origine de l'accusation portée aux États-Unis — Analyse du ministre était suffisante — Fait que le ministre a jugé préférable de respecter l'intérêt prioritaire des États-Unis parce que les actes reprochés ont eu lieu dans ce pays constituait un motif suffisant de conclure à la raisonnabilité de sa décision.

Droit criminel --- Procédures d'extradition — Extradition à partir du Canada — Recours disponibles après la décision — Contrôle judiciaire

Norme de contrôle judiciaire applicable à la décision du ministre d'ordonner l'extradition demeure celle de la raisonnabilité, même lorsque le fugitif fait valoir que l'extradition porterait atteinte à ses droits constitutionnels.

The accused sold crack cocaine to an undercover officer in Ontario and once in Detroit, Michigan. The accused was charged in Ontario with six offences in relation to these transactions, including that he had conspired to traffic in a controlled substance over the relevant period of time. The accused was not charged with the substantive offence of trafficking in relation to the Detroit transaction.

The accused pleaded guilty and was sentenced to a total of three years' imprisonment in addition to the eight months that he had spent in pre-trial custody. At the sentencing hearing, a joint submission was made recommending three years in prison. Crown counsel indicated that he agreed to a sentence that was on the low end of the range because an indictment had been issued against the accused in the U.S. for the offence of trafficking in cocaine. Crown counsel was of the view that the accused faced a strong likelihood of conviction in the U.S. and would therefore likely serve time there in addition to his Canadian sentence.

After the accused served his Canadian jail sentence, the U.S. requested that he be extradited. He was committed for surrender after an extradition hearing. The Minister of Justice ordered the accused's surrender. The Minister found that the surrender would not unjustifiably infringe the accused's rights under s. 6(1) of the Canadian Charter of Rights and Freedoms.

The accused's application for judicial review of the Minister's surrender order was dismissed. The accused appealed.

Held: The appeal was dismissed.

Per LeBel J. (McLachlin C.J.C. and Bastarache, Binnie, Deschamps, Fish, Abella, Charron and Rothstein JJ. concurring): A reviewing court owes deference to a decision by the Minister to order surrender, including the Minister's assessment of the individual's rights under the Charter. The Minister's decision should be upheld unless it is unreasonable. The Minister identified the proper test and provided sufficient reasons for his decision to order the accused's surrender. The decision to extradite the accused rather than pursue prosecution in Canada was not unreasonable.

The appropriate standard of review of the Minister's decision to order surrender is reasonableness, regardless of whether or not the fugitive argues that extradition would infringe his or her rights under the Charter. To ensure compliance with the Charter in the extradition context, the Minister must balance competing considerations, and where many such considerations are concerned, the Minister has superior expertise. The reviewing court must ask whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts. If the Minister has identified the proper test, the conclusion he has reached in applying that test should be upheld unless it is unreasonable.

It was reasonable for the Minister to conclude that the accused's extradition to the U.S. constituted a justifiable infringement of his s. 6(1) Charter rights. It was reasonable for the Minister to conclude that the accused had not already been punished for the conduct underlying the U.S. indictment. The accused was not charged with the substantive offence of trafficking in relation to the Detroit transaction. Although the accused was charged with conspiracy to traffic in narcotics on dates that included the date of the Detroit transaction, a charge of conspiracy does not subsume the substantive offence. Further, the clear implication of Crown counsel's words at the sentencing hearing was that he was not seeking to punish the accused for the Detroit transaction.

While the Minister has a duty to provide reasons for his decision, those reasons need not be comprehensive. An explanation based on what the Minister considers the most persuasive factors is sufficient for a reviewing court to determine whether his conclusion was reasonable. The Minister's analysis in this case was sufficient. The Minister's deference to the U.S. owing to the fact that the alleged conduct occurred within its territory provided a sufficient basis for concluding that his decision was reasonable. No other factor clearly outweighed the fact that the alleged conduct occurred in the U.S.

L'accusé a vendu du crack et de la cocaïne à un agent d'infiltration en Ontario et une fois à Detroit (Michigan). L'accusé a été inculpé en Ontario de six infractions en lien avec ces opérations, dont celle de complot en vue de faire le trafic d'une substance désignée au cours de la période de temps en cause. L'accusé n'a pas été accusé de l'infraction matérielle de trafic en lien avec l'opération effectuée à Detroit.

L'accusé a inscrit des plaidoyers de culpabilité et a été condamné à purger un total de trois ans d'emprisonnement, en sus des huit mois purgés en détention préventive. À l'audience de détermination de la peine, un exposé conjoint des faits a été présenté recommandant une peine de trois ans d'emprisonnement. Le ministère public a affirmé qu'il convenait d'une peine plutôt clémente pour ce genre d'infractions parce qu'un acte d'accusation avait été déposé à l'encontre de l'accusé aux États-Unis en rapport avec l'infraction de trafic de cocaïne. Le ministère public estimait que l'accusé serait vraisemblablement reconnu coupable de l'infraction aux États-Unis et qu'il y purgerait une peine d'emprisonnement en sus de celle infligée au Canada.

Après que l'accusé eut purgé sa peine d'emprisonnement au Canada, les États-Unis ont demandé son extradition. À l'issue d'une audience d'extradition, le ministre de la Justice a ordonné l'extradition de l'accusé. Selon le ministre, l'extradition ne porterait pas indûment atteinte aux droits de l'accusé suivant l'art. 6(1) de la Charte canadienne des droits et libertés. La demande de contrôle judiciaire de l'accusé à l'encontre de l'ordonnance du ministre a été rejetée.

L'accusé a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

LeBel, J. (McLachlin, J.C.C., Bastarache, Binnie, Deschamps, Fish, Abella, Charron, Rothstein, JJ., souscrivant à son opinion): Une cour de révision doit faire preuve de déférence à l'égard de la décision du ministre d'ordonner une extradition, y compris l'appréciation du ministre des droits de l'accusé en vertu de la Charte. La décision du ministre devrait être confirmée à moins qu'elle ne soit déraisonnable. Le ministre a identifié le critère approprié et sa décision d'ordonner l'extradition de l'accusé était suffisamment motivée. Le choix de faire droit à la demande d'extradition plutôt que de poursuivre au Canada n'était pas déraisonnable.

La norme de contrôle judiciaire applicable à la décision du ministre d'ordonner l'extradition demeure celle de la raisonnabilité, même lorsque le fugitif fait valoir que l'extradition porterait atteinte à ses droits constitutionnels. Pour assurer le respect de la Charte dans le contexte d'une demande d'extradition, le ministre doit tenir compte de considérations opposées et possède à l'égard de bon nombre de celles-ci une plus grande expertise. La cour de révision doit déterminer si le ministre a tenu compte des faits pertinents et tiré une conclusion susceptible de se justifier au regard de ces faits. Lorsque le ministre a choisi le bon critère, sa conclusion devrait être confirmée par la cour à moins qu'elle ne soit déraisonnable.

Le ministre pouvait raisonnablement conclure que l'extradition de l'accusé vers les États-Unis constituait une atteinte injustifiée à ses droits garantis à l'art. 6(1) de la Charte. Le ministre pouvait raisonnablement conclure que l'accusé n'avait pas encore été puni pour les faits à l'origine de l'accusation portée aux États-Unis. L'accusé n'a pas été inculpé de l'infraction matérielle de trafic en lien avec l'opération de Detroit. Bien que l'accusé était inculpé de complot en vue de faire le trafic de stupéfiants à différentes dates, dont celle correspondant à l'opération de Detroit, une inculpation de complot n'englobe pas l'infraction matérielle. De

plus, le ministère public a clairement expliqué à l'audience de détermination de la peine qu'il ne cherchait pas à condamner l'accusé pour l'opération de Detroit.

Bien que le ministre est tenu de motiver sa décision, ses motifs ne doivent pas être exhaustifs pour être suffisants. Une justification axée sur les facteurs jugés plus décisifs permet à la cour de révision de statuer sur la raisonnabilité de la conclusion. En l'espèce, l'analyse du ministre était suffisante. Le fait que le ministre a jugé préférable de respecter l'intérêt prioritaire des États-Unis parce que les actes reprochés ont eu lieu dans ce pays constituait un motif suffisant de conclure à la raisonnabilité de sa décision. Aucun autre élément ne l'emportait clairement sur le fait que les actes reprochés étaient survenus aux États-Unis.

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Canada (Minister of Justice) v. Hanson (2005), 2005 BCCA 77, 2005 CarswellBC 291, 209 B.C.A.C. 113, 345 W.A.C. 113, (sub nom. *Hanson v. Canada (Minister of Justice)*) 195 C.C.C. (3d) 46, 25 Admin. L.R. (4th) 37 (B.C. C.A.) — referred to

Canada (Minister of Justice) v. Kunze (2005), 2005 CarswellBC 337, 2005 BCCA 87, (sub nom. *Kunze v. Canada (Minister of Justice)*) 209 B.C.A.C. 32, (sub nom. *Kunze v. Canada (Minister of Justice)*) 345 W.A.C. 32, (sub nom. *United States of America v. Kunze*) 194 C.C.C. (3d) 422 (B.C. C.A.) — referred to

Canada (Minister of Justice) v. Stewart (1998), (sub nom. *Stewart v. Canada (Minister of Justice)*) 131 C.C.C. (3d) 423, 117 B.C.A.C. 284, 191 W.A.C. 284, (sub nom. *United States of America v. Stewart*) 59 C.R.R. (2d) 33, 1998 CarswellBC 2840 (B.C. C.A.) — not followed

Cotroni c. Centre de Prévention de Montréal (1989), (sub nom. *El Zein c. Centre de Prévention de Montréal*) [1989] 1 S.C.R. 1469, (sub nom. *United States v. El Zein*) 96 N.R. 321, (sub nom. *El Zein c. Centre de Prévention de Montréal*) 23 Q.A.C. 182, (sub nom. *United States v. Cotroni*) 48 C.C.C. (3d) 193, 96 N.S.R. 321, 1989 CarswellQue 1774, (sub nom. *El Zein c. Centre de Prévention de Montréal*) 42 C.R.R. 101, 1989 CarswellQue 129 (S.C.C.) — considered

Ganis v. Canada (Minister of Justice) (2006), 216 C.C.C. (3d) 337, 2006 CarswellBC 2983, 2006 BCCA 543, 386 W.A.C. 243, 233 B.C.A.C. 243 (B.C. C.A.) — referred to

Idziak v. Canada (Minister of Justice) (1992), 144 N.R. 327, 17 C.R. (4th) 161, 9 Admin. L.R. (2d) 1, 12 C.R.R. (2d) 77, [1992] 3 S.C.R. 631, 59 O.A.C. 241, 77 C.C.C. (3d) 65, 97 D.L.R. (4th) 577, 1992 CarswellOnt 1000, 1992 CarswellOnt 113 (S.C.C.) — referred to

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Ross v. United States (1996), 104 C.C.C. (3d) 446, 132 D.L.R. (4th) 383, 197 N.R. 32, 75 B.C.A.C. 239, 123 W.A.C. 239, (sub nom. *United States v. Ross)* [1996] 1 S.C.R. 469, 1996 CarswellBC 1853, 1996 CarswellBC 1854 (S.C.C.) — referred to

Suresh v. Canada (Minister of Citizenship & Immigration) (2002), 2002 SCC 1, 37 Admin. L.R. (3d) 159, [2002] 1 S.C.R. 3, 2002 CarswellNat 7, 2002 CarswellNat 8, 18 Imm. L.R. (3d) 1, 208 D.L.R. (4th) 1, 281 N.R. 1, 90 C.R.R. (2d) 1 (S.C.C.) — considered

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United States v. Bonamie (2001), [2002] 1 W.W.R. 247, 2001 ABCA 267, 2001 CarswellAlta 1404, 96 Alta. L.R. (3d) 252, (sub nom. *Bonamie, Re)* 293 A.R. 201, (sub nom. *Bonamie, Re)* 257 W.A.C. 201, 90 C.R.R. (2d) 269 (Alta. C.A.) — referred to

United States v. Burns (2001), 39 C.R. (5th) 205, 265 N.R. 212, [2001] 3 W.W.R. 193, [2001] 1 S.C.R. 283, 85 B.C.L.R. (3d) 1, 2001 SCC 7, 2001 CarswellBC 272, 2001 CarswellBC 273, 151 C.C.C. (3d) 97, 195 D.L.R. (4th) 1, 81 C.R.R. (2d) 1, 148 B.C.A.C. 1, 243 W.A.C. 1 (S.C.C.) — considered

United States v. Fordham (2005), 211 B.C.A.C. 195, 349 W.A.C. 195, 2005 BCCA 197, 2005 CarswellBC 771, 196 C.C.C. (3d) 39 (B.C. C.A.) — referred to

United States v. Gillingham (2004), 2004 BCCA 226, 2004 CarswellBC 902, 118 C.R.R. (2d) 256, 201 B.C.A.C. 26, 184 C.C.C. (3d) 97, 239 D.L.R. (4th) 320, *(sub nom. United States of America v. Gilligham)* 119 C.R.R. (2d) 188 (note) (B.C. C.A.) — referred to

United States v. Kwok (2001), 152 C.C.C. (3d) 225, 197 D.L.R. (4th) 1, 145 O.A.C. 36, 267 N.R. 310, [2001] 1 S.C.R. 532, 81 C.R.R. (2d) 189, 2001 SCC 18, 2001 CarswellOnt 966, 2001 CarswellOnt 967, 41 C.R. (5th) 44 (S.C.C.) — considered

United States v. Maydak (2004), 203 B.C.A.C. 60, 332 W.A.C. 60, 2004 BCCA 478, 2004 CarswellBC 2174, 190 C.C.C. (3d) 71, 245 D.L.R. (4th) 286 (B.C. C.A.) — referred to

United States v. Taylor (2003), 2003 BCCA 250, 2003 CarswellBC 1052, *(sub nom. United States of America v. Taylor)* 175 C.C.C. (3d) 185, 182 B.C.A.C. 83, 300 W.A.C. 83 (B.C. C.A.) — referred to

United States v. Whitley (1994), 20 O.R. (3d) 794, *(sub nom. Whitley v. United States)* 75 O.A.C. 100, 94 C.C.C. (3d) 99, 119 D.L.R. (4th) 693, 1994 CarswellOnt 1204 (Ont. C.A.) — referred to

United States v. Whitley (1996), 104 C.C.C. (3d) 447, 132 D.L.R. (4th) 575, [1996] 1 S.C.R. 467, *(sub nom. Whitley v. United States)* 27 O.R. (3d) 96, *(sub nom. Whitley v. United States)* 197 N.R. 169, *(sub nom. Whitley v. United States)* 91 O.A.C. 121, 1996 CarswellOnt 2925, 1996 CarswellOnt 2926 (S.C.C.) — referred to

United States of Mexico v. Hurley (1997), 8 C.R. (5th) 354, 45 C.R.R. (2d) 73, 35 O.R. (3d) 481, 116 C.C.C. (3d) 414, *(sub nom. Hurley v. United States of Mexico)* 101 O.A.C. 121, 1997 CarswellOnt 2172 (Ont. C.A.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — referred to

s. 6(1) — considered

s. 7 — considered

Extradition Act, S.C. 1999, c. 18

Generally — referred to

s. 25 — considered

s. 43(1) — considered

s. 44(1) — considered

s. 44(1)(a) — referred to

s. 47(a) — referred to

s. 49 — considered

s. 57(2) — considered

s. 57(7) — considered

Federal Courts Act, R.S.C. 1985, c. F-7

s. 18.1(4) [en. 1990, c. 8, s. 5] — referred to

Treaties considered:

Canada-United States Extradition Treaty, 1971, C.T.S. 1976/3; 57 U.N.T.S. 1041; T.I.A.S. No. 8237

Generally — referred to

Article 4 — referred to

APPEAL by accused from judgment reported at *United States v. Lake* (2006), 145 C.R.R. (2d) 156, 2006 CarswellOnt 5346, 212 C.C.C. (3d) 51 (Ont. C.A.), dismissing accused's application for judicial review of Minister of Justice's surrender order.

POURVOI de l'accusé à l'encontre d'un jugement publié à *United States v. Lake* (2006), 145 C.R.R. (2d) 156, 2006 CarswellOnt 5346, 212 C.C.C. (3d) 51 (Ont. C.A.), ayant rejeté la demande de contrôle judiciaire de l'accusé à l'encontre de l'ordonnance du ministère de la Justice de procéder à son extradition.

***LeBel J.*:**

I. Introduction

1 The appellant Talib Steven Lake, a dual American and Canadian citizen, faces extradition to the United States of America to stand trial on a charge of unlawfully distributing nearly 100 grams of crack cocaine in the city of Detroit, Michigan. He was committed for surrender after an extradition hearing, and the Minister of Justice ordered his surrender. Mr. Lake appeals to this Court from the Ontario Court of Appeal's decision dismissing an application for judicial review of the Minister's surrender order. He contends that extradition would unjustifiably infringe his rights under s. 6(1) of the *Canadian Charter of Rights and Freedoms*. He argues that the Minister erred in his assessment of the factors set out by this Court in *Cotroni c. Centre de Prévention de Montréal*, [1989] 1 S.C.R. 1469 (S.C.C.), and in his conclusion that extradition was preferable to prosecution in Canada. He adds that the Minister failed to provide adequate reasons as to why extradition was preferred.

2 This appeal raises two central issues. First, what is the appropriate standard to be applied by courts in reviewing a decision by the Minister to order surrender? Second, in light of that standard, should the Minister's decision be set aside in this case? In connection with these issues, the appellant also contends that the Minister did not provide adequate reasons for ordering his surrender. He argues that while deference is generally owed to a decision by the Minister to order surrender, where an individual's *Charter* rights are engaged, the appropriate standard of review is correctness. The respondent submits that, according to the jurisprudence of this Court, the Minister's assessment of a fugitive's *Charter* rights is also entitled to deference. The nature of the Minister's decision requires him, even when considering a fugitive's *Charter* rights, to weigh competing factors, many of which include foreign policy considerations in which the Minister has superior expertise. Heightened scrutiny and interference by the judiciary has the potential to seriously disrupt the extradition regime, which engages Canada's international obligations and serves as an important tool in the suppression of crime.

3 In my view, the Minister provided sufficient reasons for his decision to order the appellant's surrender. That decision was reviewable on a standard of reasonableness, and it was reasonable. I would therefore dismiss the appeal.

II. Background

4 In 1997 the appellant was charged in Windsor, Ontario with a series of offences related to cocaine trafficking. The Crown alleged that at the time, he was a U.S. citizen residing in Detroit. The charges were laid as a result of an undercover operation of the Windsor unit of the O.P.P. Drug Enforcement Branch. Mr. Lake became known to one of the investigators, Constable Ralph Faiella, as a result of a meeting between Constable Faiella and the appellant's cousin, Aaron Walls, in Windsor. In August 1997, Mr. Walls, a lifetime resident of Windsor, offered to sell Constable Faiella crack cocaine, which he said Mr. Lake would bring from Detroit. The officer agreed and a meeting was arranged. At the meeting, Constable Faiella was introduced to Mr. Lake and paid him C$1,700 in exchange for 25 grams of crack cocaine.

5 Subsequently, as a result of earlier meetings, Constable Faiella accepted an invitation to play golf with Mr. Walls and Mr. Lake. He exchanged telephone numbers with Mr. Lake, who indicated that he would be happy to sell him several ounces of cocaine for $1,625 per ounce. They agreed to contact each other at a later date.

6 On September 18, 1997, Mr. Lake and Constable Faiella made arrangements over the phone for a four-ounce transaction. Mr. Lake instructed the officer to meet him in front of Kinko's Restaurant in Detroit the following Monday, September 22, 1997, at 11:00 a.m. The Federal Bureau of Investigation was informed, and it agreed to provide and monitor

a body pack device and to provide additional surveillance. The transaction was intercepted and recorded by the F.B.I. The total weight of the cocaine purchased by Constable Faiella was later determined to be approximately 99.2 grams.

7 Constable Faiella participated in another transaction with Mr. Walls and Mr. Lake involving the sale of 96.5 grams of crack cocaine at Mr. Walls' Windsor residence in October 1997. On December 8, 1997, he telephoned Mr. Lake and set up a transaction for another four ounces of cocaine the following day. He met Mr. Walls and another man at a Windsor convenience store, where both men were immediately arrested. A search warrant was then executed at the Walls residence, and when the police arrived, Mr. Lake was in the backyard with another man and was seen to be placing something at the base of a fence. Mr. Lake was arrested, and the item seized next to the fence was found to be a plastic bag containing 65 grams of crack cocaine.

8 The appellant was charged with six offences in relation to the above transactions. One of the charges was that he had conspired with Aaron Walls to traffic in a controlled substance between September 11 and September 22, 1997. The appellant was not, however, charged with the substantive offence of trafficking in relation to the Detroit transaction. He pled guilty on all charges.

A. Sentencing Hearing

9 At the sentencing hearing before Ouellette J. of the Ontario Court (General Division), counsel made a joint submission consisting of an agreed statement of facts and a recommendation that Mr. Lake be sentenced to a total of three years in prison. Crown counsel indicated that the motivating factor in his agreeing to a three-year sentence, which he acknowledged to be "on the low end of the range with respect to these types of offences", was that he had recently received a copy of an indictment against the appellant issued in the United States District Court, Eastern District of Michigan, for the offence of trafficking in cocaine allegedly committed on September 22, 1997. Given the compelling evidence against the appellant, Crown counsel was of the view that Mr. Lake faced a strong likelihood of conviction in the United States on this charge and would therefore likely serve time there in addition to his sentence on the Canadian charges. At the time, although the appellant claimed to be a Canadian citizen by virtue of the fact that his mother had been born in Canada, he could not offer any proof of his Canadian citizenship and it was expected that deportation proceedings would take place upon conclusion of his sentence.

10 The appellant was sentenced to a total of three years' imprisonment, in addition to the eight months he had spent in pre-trial custody. At some point, he was able to establish his Canadian citizenship, and he settled in Windsor upon his release.

B. Extradition Request and Minister's Reasons for Surrender

11 On May 5, 2003, after Mr. Lake had served his Canadian jail sentence, the United States requested that he be extradited to stand trial on the trafficking offence. On June 30, 2003, the Minister issued an authority to proceed. On May 31, 2004, Mr. Lake was committed for extradition. His counsel made submissions to the Minister, arguing against surrender on several grounds. However, the Minister ordered Mr. Lake's surrender on February 28, 2005.

12 In his reasons, the Minister stated that the competent prosecutorial authority had, after considering the documentary evidence provided by the American authorities as well as the factors set out by this Court in *Cotroni*, decided that prosecution of Mr. Lake in Canada was not warranted. Although the Minister indicated that he would not interfere with this exercise of prosecutorial discretion, he nevertheless went on to consider whether the decision to prefer extradition over prosecution in Canada was consistent with Mr. Lake's rights under s. 6(1) of the *Charter*. Given that the transfer of cocaine was alleged to have taken place in Detroit, the Minister concluded that Canada did not have jurisdiction to prosecute the offence. Even if some form of prosecution in Canada were possible for this offence, he would have yielded to the superior interest of the United States in protecting its own public and maintaining public confidence in its laws and criminal justice system through prosecution. In the Minister's opinion, surrender would not unjustifiably infringe Mr. Lake's rights under s. 6(1) of the *Charter*.

13 The Minister also considered whether he should deny surrender on the basis that Mr. Lake had already been convicted and sentenced for the conduct, and the offence, for which he was sought in the United States. He decided that although the Canadian and American charges arose from the same investigation and involved overlapping conduct, they were separate and distinct and concerned two different wrongs. Ordering Mr. Lake's surrender therefore would not violate Art. 4 of the *Treaty on Extradition Between Canada and the United States of America*, Can. T.S. 1976 No. 3, or s. 47(*a*) of the *Extradition Act*, S.C. 1999, c. 18. The Minister added that Crown counsel had taken the American indictment into account in agreeing to a reduced sentence and that Ouellette J. had accepted that Mr. Lake would likely face further prosecution. He concluded that Mr. Lake had not already been sentenced for the conduct underlying the American charge.

14 The Minister decided that, despite the delay between the U.S. indictment and the formal request for Mr. Lake's extradition, this case did not amount to one of the "clearest of cases" that would justify ignoring Canada's obligations under the *Treaty*. He noted that the delay between the end of Mr. Lake's Canadian sentence and the request was only two years, and that Mr. Lake was aware of the indictment at the time of his Canadian sentencing hearing and could have turned himself in at any time in order to deal with the charge expeditiously. There was no suggestion that the delay had affected the possibility that Mr. Lake would receive a fair trial in the United States or his ability to make full answer and defence. The

Minister also observed that the mandatory ten-year minimum sentence Mr. Lake would face if convicted in the United States would not "shock the conscience" of Canadians, nor would it be unjust or oppressive in light of the seriousness of the allegations against him. Nor would Mr. Lake's personal circumstances justify refusing surrender. According to the Minister, while it was commendable that Mr. Lake was supporting his common law spouse and their children in Windsor, this fact did not amount to a compelling or overriding circumstance that outweighed the importance of ensuring that Canada was not used as a safe haven by fugitives from justice.

C. Judicial History — Ontario Court of Appeal (2006), 212 C.C.C. (3d) 51

15 On a judicial review application to the Court of Appeal, the appellant argued that the Minister had erred in concluding that surrender would not infringe his s. 6(1) mobility rights, and that the Minister's reasons for so concluding were inadequate. The appellant added that the minimum sentence he would face upon conviction in the United States was arbitrary and disproportionate and that his surrender therefore violated his rights under both s. 7 of the *Charter* and s. 44(1)(*a*) of the *Extradition Act*. On September 1, 2006, the Court of Appeal dismissed the appellant's application for judicial review.

16 Laskin J.A., for a unanimous court, agreed that the Minister had a duty to give adequate reasons for his surrender order. Such reasons should explain why the surrender order was made and should be sufficient to permit the reviewing court to determine whether the Minister applied the proper principles and fairly considered any submissions against surrender. In this case, although the Minister's reasons were brief, Laskin J.A. concluded that they were adequate.

17 Further, Laskin J.A. found no reason to interfere with the Minister's conclusion that the appellant's rights under s. 6(1) would not be unjustifiably infringed by a decision to order his surrender. In making this assessment, the Minister was required to apply the correct legal test, but his weighing of the factors relevant to that test was entitled to deference. Though the Minister had erred in concluding that Canada had no jurisdiction to prosecute Mr. Lake for the substantive offence of trafficking, this error was unimportant given that he had gone on to conclude that even if some form of prosecution in Canada was in fact possible, the United States had a greater interest in prosecuting Mr. Lake. Contrary to the appellant's submission, the Minister is not required to refer expressly to all the *Cotroni* factors. Citing this Court's decision in *United States v. Kwok*, [2001] 1 S.C.R. 532, 2001 SCC 18 (S.C.C.), Laskin J.A. concluded that the Minister's decision would be upheld if it was "clearly reasonable". In deferring to the greater interest of the United States in prosecuting Mr. Lake, the Minister's decision met this threshold requirement.

18 Regarding the mandatory minimum sentence, Laskin J.A. noted that the test under s. 7 of the *Charter* is not whether the sentence is arbitrary; arbitrariness may be a valid consideration but it is not, on its own, determinative. Rather, to infringe s. 7, the foreign sentence must "shock the conscience" (*R. v. Schmidt*, [1987] 1 S.C.R. 500 (S.C.C.), at p. 522) or be "simply unacceptable" (*United States v. Allard*, [1987] 1 S.C.R. 564 (S.C.C.), at p. 572). Under s. 44(1)(*a*) of the *Extradition Act*, the sentence must be "unjust" or "oppressive". A mandatory ten-year minimum sentence for distributing nearly 100 grams of a lethal drug is not so shocking or unjust as to warrant judicial intervention. The appellant had also argued that the sentence would be disproportionate given that courts generally impose concurrent sentences for a conviction on a substantive offence and a conviction on conspiracy to commit that offence. He submitted that he would effectively be serving consecutive sentences for the offences in the instant case. In Laskin J.A.'s view, however, proportionality is relevant only if the sentence is so extreme that it offends what is fair and just. He considered the sentence faced by the appellant to fall far short of that standard, particularly given that the U.S. indictment had been taken into account at Mr. Lake's sentencing hearing in Canada.

III. Analysis

19 In his appeal to this Court, the appellant argues that the Minister's decision should be set aside solely on the basis that extradition would unjustifiably infringe his rights under s. 6(1) of the *Charter*. He submits that none of the important objectives of extradition would be advanced by a decision to order his surrender. In particular, he argues that the Minister erred in concluding that Canada did not have jurisdiction to prosecute the offence and that he has in fact already been prosecuted and sentenced in Canada for the very conduct underlying the U.S. indictment. The appellant adds that the Minister failed to consider the factors weighing against surrender and that the Minister's reasons were therefore insufficient. He contends that the Minister's decision should be reviewed on a correctness standard and that, in light of these alleged errors, the Minister's decision was incorrect and must be set aside.

A. Issues

20 The issues to be resolved in this appeal are (1) the appropriate standard of review for the Minister's decision when a fugitive's *Charter* rights are engaged and (2) whether, in light of that standard, the Minister's decision should be upheld or set aside. As mentioned above, a related issue is whether the Minister provided sufficient reasons for his decision. Before we consider the standard, it will be necessary to review the nature of the extradition process and its status under the *Charter*.

B. Process of Extradition from Canada

21 The process of extradition from Canada has two stages: a judicial one and an executive one. The first stage consists of a committal hearing at which a committal judge assesses the evidence and determines (1) whether it discloses a *prima facie* case that the alleged conduct constitutes a crime both in the requesting state and in Canada and that the crime is the type of crime contemplated in the bilateral treaty; and (2) whether it establishes on a balance of probabilities that the person before the court is in fact the person whose extradition is sought. In addition, s. 25 of the *Extradition Act*, S.C. 1999, c. 18 (formerly s. 9(3) of the *Extradition Act*, R.S.C. 1985, c. E-23), empowers the committal judge to grant a remedy for any infringement of the fugitive's *Charter* rights that may occur at the committal stage: *Kwok*, at para. 57.

22 After an individual has been committed for extradition, the Minister reviews the case to determine whether the individual should be surrendered to the requesting state. This stage of the process has been characterized as falling "at the extreme legislative end of the *continuum* of administrative decision-making" and is viewed as being largely political in nature: *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 (S.C.C.), at p. 659 (emphasis in original). Nevertheless, the Minister's discretion is not absolute. It must be exercised in accordance with the restrictions set out in the *Extradition Act*, as well as with the *Charter*.

23 Section 44(1) of the *Extradition Act* compels the Minister to refuse surrender when he is satisfied that

> **44.** (1) . . .
>
> (*a*) the surrender would be unjust or oppressive having regard to all the relevant circumstances; or
>
> (*b*) the request for extradition is made for the purpose of prosecuting or punishing the person by reason of their race, religion, nationality, ethnic origin, language, colour, political opinion, sex, sexual orientation, age, mental or physical disability or status or that the person's position may be prejudiced for any of those reasons.

24 Although a detailed discussion on the nature of the relationship between s. 44(1) of the *Extradition Act* and s. 7 of the *Charter* will not be necessary for the purposes of this appeal, it is evident that similar considerations may often apply to both these provisions and that the protections they afford overlap somewhat. Where surrender would be contrary to the principles of fundamental justice, it will also be unjust and oppressive: *United States v. Bonamie* (2001), 293 A.R. 201 (Alta. C.A.). Where extradition is sought for the purpose of persecuting an individual on the basis of a prohibited ground, ordering surrender would be contrary to the principles of fundamental justice: *United States of Mexico v. Hurley* (1997), 35 O.R. (3d) 481 (Ont. C.A.), at pp. 496-97.

25 Section 43(1) of the *Extradition Act* provides that an individual who has been committed for extradition may make submissions against surrender to the Minister and the Minister must consider them before making his decision. If the Minister decides to order surrender, he is required to give the individual reasons for his decision: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.). In particular, the Minister must respond to any submissions against surrender made by the individual and explain why he disagrees: *United States v. Taylor* (2003), 175 C.C.C. (3d) 185 (B.C. C.A.).

26 The individual is entitled to appeal against the order of committal and to apply for judicial review of the Minister's decision to order surrender. The grounds for appealing the committal order are set out in s. 49 of the *Extradition Act*: an appeal may be filed in a provincial court of appeal on a ground involving a question of law or may be filed, with leave, on a ground involving a question of fact or mixed law and fact, or on any other ground of appeal. Section 57(7) provides that the grounds for judicial review of the Minister's decision to order surrender are those on which the Federal Court may grant relief under s. 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Thus, under s. 57(2), judicial assessment of the Minister's decision by the court of appeal is a form of administrative law review and must be conducted in accordance with the applicable administrative law standard. As I will explain below, it is my view that the applicable standard is reasonableness.

C. Extradition and the Charter

27 In determining whether surrender is consistent with the *Charter*, the Minister must consider many factors, including Canada's international obligations and its relationships with foreign governments. The need to fulfil Canada's obligations in relation to extradition is always a crucial factor precisely because of the important objectives of the extradition regime. La Forest J. elaborated on these objectives, and on the importance of international co-operation in achieving them, in *Cotroni*, at p. 1485:

> The investigation, prosecution and suppression of crime for the protection of the citizen and the maintenance of peace and public order is an important goal of all organized societies. The pursuit of that goal cannot realistically be confined within national boundaries. That has long been the case, but it is increasingly evident today. Modern communications have shrunk the world and made McLuhan's global village a reality. The only respect paid by the international criminal community to national boundaries is when these can serve as a means to frustrate the efforts of law enforcement and judicial authorities. The trafficking in drugs, with which we are here concerned, is an international enterprise and requires effective tools of international cooperation for its investigation, prosecution and suppression. Extradition is an important and well-established tool for effecting this cooperation.

28 In *Cotroni*, this Court held that while extradition constitutes a *prima facie* infringement of a Canadian citizen's mobility rights under s. 6(1) of the *Charter*, that infringement can be justified under s. 1. After canvassing the important objectives of extradition, La Forest J., for the majority, rejected the argument that extraditing a Canadian citizen to face charges on which he can be prosecuted in Canada is irrational. It may be easier to prosecute a Canadian citizen in a foreign jurisdiction owing to the availability of witnesses or evidence. In addition, the foreign jurisdiction may have a greater interest in prosecuting the offence. In concluding that the right was minimally impaired by the extradition process, he noted that "extradition practices have been tailored as much as possible for the protection of the liberty of the individual" (p. 1490).

29 On the issue of where a fugitive should be prosecuted, La Forest J. stated that "to require judicial examination of each individual case to see which could more effectively and fairly be tried in one country or the other would pose an impossible task and seriously interfere with the workings of the system" (p. 1494). Citing this Court's decisions in *R. v. L. (T.P.)*, [1987] 2 S.C.R. 309 (S.C.C.), and *R. v. Beare* (1987), [1988] 2 S.C.R. 387 (S.C.C.), he noted that prosecutorial discretion is consistent with the *Charter* and will not be interfered with absent evidence of improper or arbitrary motives. La Forest J. went on to list the considerations, now known as the "*Cotroni* factors", that will generally be considered in determining whether to prosecute in this country or to allow authorities in a foreign jurisdiction to seek extradition. These factors include:

- where was the impact of the offence felt or likely to be felt,
- which jurisdiction has the greater interest in prosecuting the offence,
- which police force played the major role in the development of the case,
- which jurisdiction has laid charges,
- which jurisdiction is ready to proceed to trial,
- where is the evidence located,
- whether the evidence is mobile,
- the number of accused involved and whether they can be gathered together in one place for trial,
- in what jurisdiction were most of the acts in furtherance of the crime committed,
- the nationality and residence of the accused,

• the severity of the sentence the accused is likely to receive in each jurisdiction.

30 How relevant each of these factors is to the determination of the appropriate jurisdiction for prosecution may vary from case to case. Nothing in *Cotroni* suggests that these factors should be given equal weight or precludes a conclusion that a single factor is determinative in a particular case. The list merely identifies some of the factors that will tend to favour either extradition or prosecution in Canada. To instruct prosecutorial authorities on how to decide whether to prosecute would deprive the concept of prosecutorial discretion of all meaning. The responsibility for deciding which factors are determinative lies with the authorities themselves; the list serves simply to highlight the relevant factors. The exercise of prosecutorial discretion will be interfered with in only the clearest of cases, such as where there is evidence of bad faith or improper motives. Absent such evidence, the infringement of an individual's s. 6(1) mobility rights upon surrender will not be unjustified merely because the Minister has decided, rather than prosecuting the individual in Canada, to defer to the foreign authorities seeking extradition.

31 The Minister is also often asked to consider whether surrender would violate an individual's rights under s. 7 of the *Charter*. The test that has been applied is whether ordering extradition would "shock the conscience" (*Schmidt*, at p. 522), or whether the fugitive faces "a situation that is simply unacceptable" (*Allard*, at p. 572). In *Schmidt*, La Forest J. emphasized that deference is owed to the Minister's assessment:

> The courts have the duty to uphold the Constitution. Nonetheless, this is an area where the executive is likely to be far better informed than the courts, and where the courts must be extremely circumspect so as to avoid interfering unduly in decisions that involve the good faith and honour of this country in its relations with other states. In a word, judicial intervention must be limited to cases of real substance. [p. 523]

32 In *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 (S.C.C.), the majority of this Court explained that the proper approach is to balance the factors for and against extradition in the circumstances in order to determine whether extradition would tend to "shock the conscience". In *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7 (S.C.C.), the Court reaffirmed the *Kindler* approach but added that the words "shock the conscience" should not "be allowed to obscure the ultimate assessment that is required: namely, whether or not the extradition is in accordance with the principles of fundamental justice" (para. 68). In making this assessment, the relevant factors may be specific to the fugitive, such as age or mental condition, or general, such as considerations associated with a particular form of punishment.

33 In *Burns*, the issue was whether s. 7 requires that the Minister, before ordering surrender, seek assurances that the death penalty will not be imposed where the fugitive

faces the possibility of being sentenced to death upon conviction in the requesting state. In concluding that such assurances are required in all but the most exceptional cases, the Court emphasized the serious philosophical and practical concerns regarding capital punishment that had been expressed by Canada and by the international community, noting in particular the fact that the death penalty is final and irreversible. In addition, the Minister was unable to "poin[t] to any public purpose that would be served by extradition *without* assurances that is not substantially served by extradition *with* assurances" (para. 125 (emphasis in original)). *Burns* thus serves as an example of the kind of critical circumstances in which a reviewing court will interfere with the Minister's decision.

D. Standard of Review

34 This Court has repeatedly affirmed that deference is owed to the Minister's decision whether to order surrender once a fugitive has been committed for extradition. The issue in the case at bar concerns the standard to be applied in reviewing the Minister's assessment of a fugitive's *Charter* rights. Reasonableness is the appropriate standard of review for the Minister's decision, regardless of whether the fugitive argues that extradition would infringe his or her rights under the *Charter*. As is evident from this Court's jurisprudence, to ensure compliance with the *Charter* in the extradition context, the Minister must balance competing considerations, and where many such considerations are concerned, the Minister has superior expertise. The assertion that interference with the Minister's decision will be limited to exceptional cases of "real substance" reflects the breadth of the Minister's discretion; the decision should not be interfered with unless it is unreasonable (*R. v. Schmidt*) (for comments on the standards of correctness and reasonableness, see *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190, 2008 SCC 9 (S.C.C.)).

35 The appellant argues that where the decision to order surrender engages an individual's *Charter* rights, the appropriate standard of review is correctness. According to the appellant, though reviewing courts generally owe, and generally show, great deference to the Minister's decision, the Minister's assessment of the fugitive's *Charter* rights is entitled to no such deference. Although the appellant concedes that the Minister has superior expertise in relation to Canada's treaty obligations and international interests, he does not consider the Minister to have superior expertise where the constitutionality of his own decision is concerned. He adds that the reviewing court is the first point of access to *Charter* relief at the surrender stage, noting the following statement of Arbour J. in *Kwok*, at para. 80:

> The Minister is required to respect a fugitive's constitutional rights in deciding whether to exercise his or her discretion to surrender the fugitive to the Requesting State. But the Minister cannot decide whether a *Charter* breach has occurred and, if so, grant the fugitive an appropriate remedy. That function is judicial, not ministerial. (See also para. 94)

Finally, the appellant submits that although the Minister's assessment of a fugitive's *Charter* rights involves many factual considerations, it is fundamentally a legal matter. In my view, the appellant's arguments are flawed for the following reasons.

36 First, it should be noted that in *Kwok*, Arbour J. was responding to an argument by the appellant in that case that s. 6(1) of the *Charter* is relevant at the committal stage. In support of this argument, Mr. Kwok had stated that the Minister is not a "'court of competent jurisdiction', empowered by the *Charter* to grant constitutional remedies": *Kwok*, at para. 80. Although she acknowledged that the Minister cannot grant remedies for a *Charter* breach, Arbour J. pointed out that the Minister's decision is subject to judicial review by the provincial court of appeal. If a *Charter* breach occurs, the appellate court is empowered to grant an appropriate remedy. However, this line of reasoning sheds no light on the standard the appellate court should apply in reviewing the Minister's decision in order to determine whether such a breach has occurred. It merely refutes the argument that any infringement of s. 6(1) rights must be assessed at the committal hearing.

37 Second, the Minister's superior expertise in relation to Canada's international obligations and foreign affairs remains relevant to the review of his assessment of a fugitive's claim that extradition would violate his or her rights under the *Charter*. Whereas the Minister's discretion must be exercised in accordance with the *Charter*, his assessment of any *Charter* infringement that could result from ordering an individual's surrender is closely intertwined with his responsibility to ensure that Canada fulfills its international obligations. The right of a Canadian citizen under s. 6(1) to remain in Canada is *prima facie* infringed by a decision to order that citizen's surrender for extradition, but the infringement can generally be justified under s. 1, as this Court held in *Cotroni*. In determining whether the infringement is justified, the Minister is required to consider not only "the possibility of prosecution in Canada, but also the interest of the foreign State in prosecuting the fugitive on its own territory": *Kwok*, at para. 93. Accordingly, the Minister's assessment of whether the infringement of s. 6(1) is justified rests largely on his decision whether Canada should defer to the interests of the requesting state. This is largely a political decision, not a legal one. The legal threshold for finding it unacceptable is evidence that the decision not to prosecute in Canada was made for improper or arbitrary motives. This leaves room for considerable deference to the Minister's conclusion that the infringement of s. 6(1) is justified.

38 Similarly, the Minister's assessment of whether extradition accords with the fugitive's s. 7 rights involves a balancing test. As I mentioned above, the Minister must weigh the factors for and against extradition to determine whether the circumstances are such that extradition would "shock the conscience". In *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (S.C.C.), this Court considered the appropriate standard of review for the Minister's decision whether a refugee faces a substantial risk of

torture upon deportation. In its view, the Minister's decision in that context requires a fact-driven inquiry involving the weighing of various factors and possessing "a negligible legal dimension" (para. 39). Accordingly, the Court concluded that the Minister's decision would be entitled to deference upon judicial review.

39 Whether extradition would "shock the conscience" involves a similar type of inquiry. The Minister must balance the individual's circumstances and the consequences of extradition against such factors as the seriousness of the offence for which extradition is sought and the importance of meeting Canada's international obligations and generally ensuring that Canada is not used as a safe haven by fugitives from justice. This inquiry will also often involve consideration of the protections that would be available to the fugitive and the conditions he or she would face in the requesting state. To say, as does the appellant in the instant case, that the decision whether surrender would unjustifiably infringe a fugitive's *Charter* rights remains fundamentally a legal matter is to disregard the reality that *all* executive and administrative decisions involving one's rights are in essence "legal matters". Yet not all such decisions are subject to judicial review on a correctness standard. The decision in issue in *Suresh* was clearly a legal matter. The Court concluded that deference was owed to the Minister's decision because it was based primarily on the Minister's assessment of the facts; there was generally no need for the court to re-weigh the facts. The same is true in the extradition context.

40 The appellant also pointed to several decisions of the British Columbia Court of Appeal in which the Minister's assessment of a fugitive's *Charter* rights and of whether extradition would be unjust or oppressive within the meaning of s. 44(1)(*a*) of the *Extradition Act* was reviewed on a correctness standard: *Canada (Minister of Justice) v. Stewart* (1998), 131 C.C.C. (3d) 423 (B.C. C.A.); *United States v. Gillingham* (2004), 184 C.C.C. (3d) 97 (B.C. C.A.); *United States v. Maydak* (2004), 190 C.C.C. (3d) 71 (B.C. C.A.); *Canada (Minister of Justice) v. Kunze* (2005), 194 C.C.C. (3d) 422 (B.C. C.A.); *Canada (Minister of Justice) v. Hanson* (2005), 195 C.C.C. (3d) 46 (B.C. C.A.); *United States v. Fordham* (2005), 196 C.C.C. (3d) 39 (B.C. C.A.); *Ganis v. Canada (Minister of Justice)* (2006), 216 C.C.C. (3d) 337 (B.C. C.A.)). In *Stewart*, the first case in which a court held that the appropriate standard was correctness, Donald J.A. expressed the concern that "[i]f deference were accorded [the Minister's] assessment of the constitutional validity of [his] own act then I believe that judicial review would be unacceptably attenuated" (para. 18). With respect, this concern is misplaced. It rests on an incorrect understanding of the Minister's role in assessing the interests at stake in the extradition context. It is also inconsistent with this Court's jurisprudence on the judicial review of extradition decisions.

41 Reasonableness does not require blind submission to the Minister's assessment; however, the standard does entail more than one possible conclusion. The reviewing court's role is not to re-assess the relevant factors and substitute its own view. Rather, the court

must determine whether the Minister's decision falls within a range of reasonable outcomes. To apply this standard in the extradition context, a court must ask whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts. I agree with Laskin J.A. that the Minister must, in reaching his decision, apply the correct legal test. The Minister's conclusion will not be rational or defensible if he has failed to carry out the proper analysis. If, however, the Minister has identified the proper test, the conclusion he has reached in applying that test should be upheld by a reviewing court unless it is unreasonable. This approach does not minimize the protection afforded by the *Charter*. It merely reflects the fact that in the extradition context, the proper assessments under ss. 6(1) and 7 involve primarily fact-based balancing tests. Given the Minister's expertise and his obligation to ensure that Canada complies with its international commitments, he is in the best position to determine whether the factors weigh in favour of or against extradition.

E. Application to the Facts of this Case

42 The appellant asks that the Minister's decision be set aside on the basis that extradition would constitute an unjustified infringement of his rights under s. 6(1) of the *Charter*. As I explained above, s. 6(1) requires the Minister to consider the possibility of prosecution in Canada. The Minister concluded that Canada did not have jurisdiction to prosecute the appellant for the substantive offence of trafficking that was based on the conduct that occurred in Detroit on September 22, 1997. However, he went on to say that regardless of whether or not Canada had jurisdiction to prosecute the appellant for that conduct, he would defer to the greater interest of the United States. Assuming, for the sake of argument, that Canada does have jurisdiction to prosecute the appellant, the issue is whether it was reasonable for the Minister to conclude that his extradition to the United States constitutes a justifiable infringement of his s. 6(1) rights.

43 The appellant did not press the argument before this Court that he would be entitled to plead *autrefois convict* if he were actually to be charged in Canada with the substantive offence of trafficking in relation to the transaction of September 22, 1997. Nor did he argue that the Minister's decision conflicted with Art. 4 of the *Treaty*, which prohibits extradition if the fugitive has already been convicted of or discharged for the alleged offence. Rather, the appellant focusses on the allegation that it would be unfair to extradite him on the trafficking charge, because he has already been prosecuted and sentenced in Canada. This, he argues, is a relevant factor to be considered in determining whether the infringement of his s. 6(1) rights can be justified under s. 1.

44 In my view, the Minister's conclusion was not unreasonable. The appellant was not charged with the substantive offence of trafficking in relation to the transaction of September 22, 1997. Although it is true that he was charged with conspiracy to traffic in narcotics on dates that included September 22, 1997, a charge of conspiracy does not subsume

the substantive offence. An individual may be convicted both of conspiracy and of the substantive offence that was the object of that conspiracy: *R. v. Sheppe*, [1980] 2 S.C.R. 22 (S.C.C.). If an accused is convicted on both charges, the usual order is that the sentences be served concurrently. However, even if an accused is charged only with conspiracy, evidence that he or she actually committed the substantive offence will generally lead to a harsher sentence than if the accused had conspired to commit it but had not actually done so.

45 The Minister was of the view that the Canadian sentence did not reflect the fact that the appellant had committed the substantive offence. After reviewing the transcript of the sentencing hearing and the agreed statement of facts, the Minister noted that the sentencing judge had made no reference to the U.S. indictment and that Crown counsel had advised the court that he was seeking a *reduced* sentence in light of that indictment. Although the agreed statement of facts does make reference to the transaction of September 22, 1997, the clear implication of Crown counsel's words at the sentencing hearing was that he was not seeking to punish the appellant for the Detroit transaction precisely because he expected the appellant to be punished for that offence in the United States. The relevant part of the transcript reads as follows:

> What Mr. Lake faces is prosecution with respect to this charge in the United States, in which the evidence is compelling. And the likelihood of him being convicted in the United States as a result of the events of September 22, 1997, are high. The crown has taken that into account with respect to looking at the entire situation. And that was a motivating factor as far as the crown was concerned with respect to this sentence which I acknowledge is on the low end of the range with respect to these types of offences. [A.R., at p. 85]

In my view, it was reasonable for the Minister to conclude, relying upon the transcript of the sentencing hearing, that the appellant had not already been punished for the conduct underlying the U.S. indictment.

46 As for the adequacy of the Minister's reasons, while I agree that the Minister has a duty to provide reasons for his decision, those reasons need not be comprehensive. The purpose of providing reasons is twofold: to allow the individual to understand why the decision was made; and to allow the reviewing court to assess the validity of the decision. The Minister's reasons must make it clear that he considered the individual's submissions against extradition and must provide some basis for understanding why those submissions were rejected. Though the Minister's *Cotroni* analysis was brief in the instant case, it was in my view sufficient. The Minister is not required to provide a detailed analysis for every factor. An explanation based on what the Minister considers the most persuasive factors will be sufficient for a reviewing court to determine whether his conclusion was reasonable.

47 In the case at bar, the Minister stated that he had considered the *Cotroni* factors, and in reaching his conclusion he emphasized that the alleged conduct had occurred in the United States:

> ... I would yield to the superior interest of the United States of America in prosecuting this matter. The evidence alleges that Mr. Lake trafficked cocaine within the boundaries of the United States of America. The United States of America is entitled to seek to protect its own public and maintain public confidence in its laws and criminal justice system through prosecution. [A.R., at p. 17]

48 Although the *locus delicti* may not always be determinative, in this case, there is nothing unreasonable about the Minister's conclusion. There is no other factor that would clearly outweigh the fact that the alleged conduct occurred in the United States. The appellant points to the severity of the punishment he will face upon conviction in the United States. However, this Court has upheld other decisions by the Minister to extradite individuals who face long prison sentences for drug offences: *Jamieson v. Canada (Minister of Justice)*, [1996] 1 S.C.R. 465 (S.C.C.); *United States v. Whitley* (1994), 94 C.C.C. (3d) 99 (Ont. C.A.), aff'd by and reasons adopted at [1996] 1 S.C.R. 467 (S.C.C.); *Ross v. United States* (1994), 93 C.C.C. (3d) 500 (B.C. C.A.), aff'd by and reasons adopted at [1996] 1 S.C.R. 469 (S.C.C.). The sentence does not on its own provide a sufficient basis for interfering with a decision by the Minister to surrender a fugitive for extradition. The Minister's deference to the United States owing to the fact that the alleged conduct occurred within its territory provides a sufficient basis for concluding that his decision was reasonable.

IV. Conclusion

49 In light of this Court's jurisprudence, it is clear that a reviewing court owes deference to a decision by the Minister to order surrender, including the Minister's assessment of the individual's *Charter* rights. Although the Minister must apply the proper legal principles, his decision should be upheld unless it is unreasonable. In the case at bar, the Minister identified the proper test and provided reasons that were sufficient to indicate the basis for his decision to order the appellant's surrender. In my view, his decision to extradite the appellant rather than pursue prosecution in Canada is not unreasonable. The appeal is therefore dismissed.

Appeal dismissed.

Pourvoi rejeté.

TAB 4

Most Negative Treatment: Distinguished
Most Recent Distinguished: Sydoruk v. Canada (Minister of Citizenship and Immigration) | 2015 FC 945, 2015 CF 945, 2015 CarswellNat 3358, 2015 CarswellNat 4477, 38 Imm. L.R. (4th) 134, 257 A.C.W.S. (3d) 688, [2015] F.C.J. No. 943 | (F.C., Aug 6, 2015)

2011 SCC 62
Supreme Court of Canada

N.L.N.U. v. Newfoundland & Labrador (Treasury Board)

2011 CarswellNfld 414, 2011 CarswellNfld 415, 2011 SCC 62, [2011] 3 S.C.R. 708, [2011] S.C.J. No. 62, 2011 C.L.L.C. 220-008, 208 A.C.W.S. (3d) 435, 213 L.A.C. (4th) 95, 317 Nfld. & P.E.I.R. 340, 340 D.L.R. (4th) 17, 38 Admin. L.R. (5th) 255, 424 N.R. 220, 97 C.C.E.L. (3d) 199, 986 A.P.R. 340, D.T.E. 2012T-7

Newfoundland and Labrador Nurses' Union (Appellant) and Her Majesty The Queen in Right of Newfoundland and Labrador, represented by Treasury Board and Newfoundland and Labrador Health Boards Association, on behalf of Labrador-Grenfell Regional Health Authority (Respondents)

McLachlin C.J.C., LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell JJ.

Heard: October 14, 2011
Judgment: December 15, 2011
Docket: 33659

Proceedings: affirming *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)* (2010), (sub nom. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*) 294 Nfld. & P.E.I.R. 161, (sub nom. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*) 908 A.P.R. 161, (sub nom. *Newfoundland & Labrador v. NLNU*) 2010 C.L.L.C. 220-017, 2010 NLCA 13, 2010 CarswellNfld 49, 190 L.A.C. (4th) 385 (N.L. C.A.); reversing *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)* (2008), 2008 NLTD 200, 2008 CarswellNfld 332, (sub nom. *Newfoundland & Labrador Nurses' Union v. Newfoundland & Labrador (Treasury Board)*) 873 A.P.R. 170, (sub nom. *Newfoundland & Labrador Nurses' Union v. Newfoundland & Labrador (Treasury Board)*) 283 Nfld. & P.E.I.R. 170 (N.L. T.D.)

Counsel: David G. Conway, Tracey L. Trahey for Appellant
Stephen F. Penney, Jeffrey Beedell for Respondents

Subject: Labour; Public
Related Abridgment Classifications
Administrative law
III Requirements of natural justice
III.1 Right to hearing
III.1.c Procedural rights at hearing
III.1.c.vi Reasons for decision
Labour and employment law
I Labour law
I.6 Collective agreement
I.6.f Vacations and holidays
I.6.f.ii Entitlement
Labour and employment law
I Labour law
I.8 Labour arbitrations
I.8.i Judicial review
I.8.i.ii Standard of review
I.8.i.ii.B Reasonableness
Headnote
Labour and employment law --- Labour law — Collective agreement — Vacations and holidays — Entitlement
Arbitrator interpreted nurses' collective agreement (CA) as excluding years of casual service from calculation of vacation entitlement after nurses became permanent, temporary or part-time — On review, trial judge set aside arbitrator's award on basis that his reasons were not sufficiently supported, and remitted grievance to new arbitrator — Court of Appeal allowed employer's appeal, concluding that trial judge erred in focusing on "how" rather than "why" arbitrator reached conclusion he did, and holding that arbitrator's reasons indicated why conclusion was reached, fell within range of possible, acceptable outcomes defensible in respect of facts and law, and satisfied Dunsmuir criteria of justification, transparency and intelligibility — Union appealed — Appeal dismissed — Arbitrator outlined relevant facts, arguments, interpretive principles, and CA provisions, and came to conclusion well within range of reasonable outcomes — When Court in Dunsmuir called for justification, transparency and intelligibility in decision-maker's reasons, it recognized that specialized decision-makers render decisions in areas of expertise, often using unique concepts and language, rendering decisions counterintuitive to generalist — Dunsmuir did not stand for proposition that adequacy of reasons was stand-alone basis for quashing decision — Courts should not expect decision-maker to include every argument, statutory provision, decision or other detail in reasons or to make explicit findings on each constituent element leading to conclusion, provided reviewing court could understand why decision was made and whether it was within range of acceptable outcomes — On reasonableness review, guiding principle

was deference — Court's 1999 decision in Baker did not stand for proposition that reasons were always required, or that quality of those reasons was question of procedural fairness, and it was not helpful to suggest that decision meant alleged deficiencies or flaws in reasons constituted breach of duty of procedural fairness triggering correctness review — Finding that tribunal's reasoning process was inadequately revealed was not same as disagreement over tribunal's conclusions — Arbitrator provided reasons and did not breach duty of procedural fairness, so review was to be made within reasonableness analysis — Simple interpretive exercise before arbitrator was classic fare for labour arbitrators, and to expect him to respond to every possible argument or line of analysis would paralyse arbitration process directed at speedy resolution of disputes with knowledge that review and negotiation of new CA were possible.

Labour and employment law --- Labour law — Labour arbitrations — Judicial review — Standard of review — Reasonableness

Arbitrator interpreted nurses' collective agreement (CA) as excluding years of casual service from calculation of vacation entitlement after nurses became permanent, temporary or part-time — On review, trial judge set aside arbitrator's award on basis that his reasons were not sufficiently supported, and remitted grievance to new arbitrator — Court of Appeal allowed employer's appeal, concluding that trial judge erred in focusing on "how" rather than "why" arbitrator reached conclusion he did, and holding that arbitrator's reasons indicated why conclusion was reached, fell within range of possible, acceptable outcomes defensible in respect of facts and law, and satisfied Dunsmuir criteria of justification, transparency and intelligibility — Union appealed — Appeal dismissed — Arbitrator outlined relevant facts, arguments, interpretive principles, and CA provisions, and came to conclusion well within range of reasonable outcomes — When Court in Dunsmuir called for justification, transparency and intelligibility in decision-maker's reasons, it recognized that specialized decision-makers render decisions in areas of expertise, often using unique concepts and language, rendering decisions counterintuitive to generalist — Dunsmuir did not stand for proposition that adequacy of reasons was stand-alone basis for quashing decision — Courts should not expect decision-maker to include every argument, statutory provision, decision or other detail in reasons or to make explicit findings on each constituent element leading to conclusion, provided reviewing court could understand why decision was made and whether it was within range of acceptable outcomes — On reasonableness review, guiding principle was deference — Court's 1999 decision in Baker did not stand for proposition that reasons were always required, or that quality of those reasons was question of procedural fairness, and it was not helpful to suggest that decision meant alleged deficiencies or flaws in reasons constituted breach of duty of procedural fairness triggering correctness review — Finding that tribunal's reasoning process was inadequately revealed was not same as disagreement over tribunal's conclusions — Arbitrator provided reasons and did not breach duty of procedural fairness, so review was to be made within reasonableness analysis — Simple interpretive exercise before arbitrator was classic fare for labour arbitrators, and to expect

him to respond to every possible argument or line of analysis would paralyse arbitration process directed at speedy resolution of disputes with knowledge that review and negotiation of new CA were possible.

Administrative law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Reasons for decision

Arbitrator interpreted nurses' collective agreement (CA) as excluding years of casual service from calculation of vacation entitlement after nurses became permanent, temporary or part-time — On review, trial judge set aside arbitrator's award on basis that his reasons were not sufficiently supported, and remitted grievance to new arbitrator — Court of Appeal allowed employer's appeal, concluding that trial judge erred in focusing on "how" rather than "why" arbitrator reached conclusion he did, and holding that arbitrator's reasons indicated why conclusion was reached, fell within range of possible, acceptable outcomes defensible in respect of facts and law, and satisfied Dunsmuir criteria of justification, transparency and intelligibility — Union appealed — Appeal dismissed — Arbitrator outlined relevant facts, arguments, interpretive principles, and CA provisions, and came to conclusion well within range of reasonable outcomes — When Court in Dunsmuir called for justification, transparency and intelligibility in decision-maker's reasons, it recognized that specialized decision-makers render decisions in areas of expertise, often using unique concepts and language, rendering decisions counterintuitive to generalist — Dunsmuir did not stand for proposition that adequacy of reasons was stand-alone basis for quashing decision — Courts should not expect decision-maker to include every argument, statutory provision, decision or other detail in reasons or to make explicit findings on each constituent element leading to conclusion, provided reviewing court could understand why decision was made and whether it was within range of acceptable outcomes — On reasonableness review, guiding principle was deference — Court's 1999 decision in Baker did not stand for proposition that reasons were always required, or that quality of those reasons was question of procedural fairness, and it was not helpful to suggest that decision meant alleged deficiencies or flaws in reasons constituted breach of duty of procedural fairness triggering correctness review — Finding that tribunal's reasoning process was inadequately revealed was not same as disagreement over tribunal's conclusions — Arbitrator provided reasons and did not breach duty of procedural fairness, so review was to be made within reasonableness analysis — Simple interpretive exercise before arbitrator was classic fare for labour arbitrators, and to expect him to respond to every possible argument or line of analysis would paralyse arbitration process directed at speedy resolution of disputes with knowledge that review and negotiation of new CA were possible.

Droit du travail et de l'emploi --- Droit du travail — Convention collective — Vacances et congés — Droit

Arbitre a conclu qu'en vertu de la convention collective (CC), les infirmières ne pouvaient pas inclure leurs années de service à titre d'employées occasionnelles dans le calcul servant à déterminer leur droit aux congés lorsqu'elles atteignaient le statut d'employée permanente,

temporaire ou à temps partiel — Lors du contrôle judiciaire, le juge de première instance a annulé la sentence arbitrale parce que les motifs exposés par l'arbitre n'étaient pas suffisamment étayés, et il a renvoyé le dossier à un nouvel arbitre — Cour d'appel a accueilli l'appel interjeté par l'employeur et a conclu que le juge de première instance avait commis une erreur en se concentrant sur la « manière » avec laquelle l'arbitre avait tiré ses conclusions, plutôt que de se demander « pourquoi », et a estimé que les motifs de l'arbitre exposaient le fondement de sa décision, laquelle faisait partie des issues possibles raisonnables, compte tenu des faits et du droit, et satisfaisait aux critères de l'arrêt Dunsmuir, soit ceux de la justification de la décision ainsi que de la transparence et de l'intelligibilité du processus décisionnel — Syndicat a formé un pourvoi — Pourvoi rejeté — Arbitre a énoncé les faits pertinents, les arguments des parties, les principes d'interprétation applicables ainsi que les dispositions pertinentes de la CC et en a tiré une conclusion qui faisait indubitablement partie des issues raisonnables — Lorsque la Cour, dans l'arrêt Dunsmuir, a parlé de la justification de la décision, de la transparence et de l'intelligibilité du processus décisionnel, elle reconnaissait que le vaste éventail de décideurs spécialisés qui rendent couramment des décisions dans leurs sphères d'expertise ont souvent recours à des concepts et des termes particuliers et rendent des décisions qui apparaissent illogiques aux yeux du généraliste — Arrêt Dunsmuir ne signifiait pas que l'insuffisance des motifs permettait à elle seule de casser une décision — Tribunaux ne devraient pas s'attendre à ce que les décideurs prennent en compte chacun des arguments avancés, chacune des dispositions législatives citées, chacune des décisions soumises ou tout autre détail ou tire une conclusion explicite sur chaque élément constitutif du raisonnement qui a mené à sa conclusion finale, du moment que les motifs permettent au tribunal siégeant en révision de comprendre le fondement de la décision et de déterminer si la décision faisait partie des issues acceptables — Dans le cadre d'un examen portant sur la norme de la décision raisonnable, la déférence est le principe directeur — Décision de la Cour en 1999 dans l'affaire Baker n'établissait pas que des motifs s'imposaient dans tous les cas, ni que leur qualité relevait de l'équité procédurale, et il était inutile de se fonder sur cette décision pour prétendre que les lacunes ou les vices dont seraient entachés les motifs appartenaient à la catégorie des manquements à l'obligation d'équité procédurale et qu'ils étaient soumis à la norme de la décision correcte — Conclusion que le raisonnement du tribunal n'était pas adéquatement exposé n'équivalait pas à un désaccord au sujet des conclusions tirées par celui-ci — Arbitre a exposé ses motifs et il n'y avait aucun manquement à l'obligation d'équité procédurale, de sorte que le raisonnement de l'arbitre ou le résultat auquel il était arrivé devaient être examinés en fonction de la norme de la décision raisonnable — Pour les arbitres en relations de travail, il était courant de se livrer au simple exercice d'interprétation requis en l'espèce et il ne fallait pas s'attendre à ce que l'arbitre réponde à chaque argument possible ou expose toute analyse imaginable, puisque cela risquait de paralyser le processus d'arbitrage, lequel a pour fonction de résoudre les litiges avec célérité, tout en gardant en tête qu'un contrôle judiciaire et la négociation d'une nouvelle CC sont possibles.

Droit du travail et de l'emploi --- Droit du travail — Sentences arbitrales — Contrôle judiciaire — Norme de contrôle — Décision raisonnable

Arbitre a conclu qu'en vertu de la convention collective (CC), les infirmières ne pouvaient pas inclure leurs années de service à titre d'employées occasionnelles dans le calcul servant à déterminer leur droit aux congés lorsqu'elles atteignaient le statut d'employée permanente, temporaire ou à temps partiel — Lors du contrôle judiciaire, le juge de première instance a annulé la sentence arbitrale parce que les motifs exposés par l'arbitre n'étaient pas suffisamment étayés, et il a renvoyé le dossier à un nouvel arbitre — Cour d'appel a accueilli l'appel interjeté par l'employeur et a conclu que le juge de première instance avait commis une erreur en se concentrant sur la « manière » avec laquelle l'arbitre avait tiré ses conclusions, plutôt que de se demander « pourquoi », et a estimé que les motifs de l'arbitre exposaient le fondement de sa décision, laquelle faisait partie des issues possibles raisonnables, compte tenu des faits et du droit, et satisfaisait aux critères de l'arrêt Dunsmuir, soit ceux de la justification de la décision ainsi que de la transparence et de l'intelligibilité du processus décisionnel — Syndicat a formé un pourvoi — Pourvoi rejeté — Arbitre a énoncé les faits pertinents, les arguments des parties, les principes d'interprétation applicables ainsi que les dispositions pertinentes de la CC et en a tiré une conclusion qui faisait indubitablement partie des issues raisonnables — Lorsque la Cour, dans l'arrêt Dunsmuir, a parlé de la justification de la décision, de la transparence et de l'intelligibilité du processus décisionnel, elle reconnaissait que le vaste éventail de décideurs spécialisés qui rendent couramment des décisions dans leurs sphères d'expertise ont souvent recours à des concepts et des termes particuliers et rendent des décisions qui apparaissent illogiques aux yeux du généraliste — Arrêt Dunsmuir ne signifiait pas que l'insuffisance des motifs permettait à elle seule de casser une décision — Tribunaux ne devraient pas s'attendre à ce que les décideurs prennent en compte chacun des arguments avancés, chacune des dispositions législatives citées, chacune des décisions soumises ou tout autre détail ou tire une conclusion explicite sur chaque élément constitutif du raisonnement qui a mené à sa conclusion finale, du moment que les motifs permettent au tribunal siégeant en révision de comprendre le fondement de la décision et de déterminer si la décision faisait partie des issues acceptables — Dans le cadre d'un examen portant sur la norme de la décision raisonnable, la déférence est le principe directeur — Décision de la Cour en 1999 dans l'affaire Baker n'établissait pas que des motifs s'imposaient dans tous les cas, ni que leur qualité relevait de l'équité procédurale, et il était inutile de se fonder sur cette décision pour prétendre que les lacunes ou les vices dont seraient entachés les motifs appartenaient à la catégorie des manquements à l'obligation d'équité procédurale et qu'ils étaient soumis à la norme de la décision correcte — Conclusion que le raisonnement du tribunal n'était pas adéquatement exposé n'équivalait pas à un désaccord au sujet des conclusions tirées par celui-ci — Arbitre a exposé ses motifs et il n'y avait aucun manquement à l'obligation d'équité procédurale, de sorte que le raisonnement de l'arbitre ou le résultat auquel il était arrivé devaient être examinés en fonction de la norme de la décision raisonnable — Pour les arbitres en relations de travail, il était courant de se livrer au simple exercice d'interprétation requis en l'espèce et

il ne fallait pas s'attendre à ce que l'arbitre réponde à chaque argument possible ou expose toute analyse imaginable, puisque cela risquait de paralyser le processus d'arbitrage, lequel a pour fonction de résoudre les litiges avec célérité, tout en gardant en tête qu'un contrôle judiciaire et la négociation d'une nouvelle CC sont possibles.

Droit administratif --- Exigences de justice naturelle — Droit à l'audition — Droits procéduraux lors de l'audition — Motifs de la décision

Arbitre a conclu qu'en vertu de la convention collective (CC), les infirmières ne pouvaient pas inclure leurs années de service à titre d'employées occasionnelles dans le calcul servant à déterminer leur droit aux congés lorsqu'elles atteignaient le statut d'employée permanente, temporaire ou à temps partiel — Lors du contrôle judiciaire, le juge de première instance a annulé la sentence arbitrale parce que les motifs exposés par l'arbitre n'étaient pas suffisamment étayés, et il a renvoyé le dossier à un nouvel arbitre — Cour d'appel a accueilli l'appel interjeté par l'employeur et a conclu que le juge de première instance avait commis une erreur en se concentrant sur la « manière » avec laquelle l'arbitre avait tiré ses conclusions, plutôt que de se demander « pourquoi », et a estimé que les motifs de l'arbitre exposaient le fondement de sa décision, laquelle faisait partie des issues possibles raisonnables, compte tenu des faits et du droit, et satisfaisait aux critères de l'arrêt Dunsmuir, soit ceux de la justification de la décision ainsi que de la transparence et de l'intelligibilité du processus décisionnel — Syndicat a formé un pourvoi — Pourvoi rejeté — Arbitre a énoncé les faits pertinents, les arguments des parties, les principes d'interprétation applicables ainsi que les dispositions pertinentes de la CC et en a tiré une conclusion qui faisait indubitablement partie des issues raisonnables — Lorsque la Cour, dans l'arrêt Dunsmuir, a parlé de la justification de la décision, de la transparence et de l'intelligibilité du processus décisionnel, elle reconnaissait que le vaste éventail de décideurs spécialisés qui rendent couramment des décisions dans leurs sphères d'expertise ont souvent recours à des concepts et des termes particuliers et rendent des décisions qui apparaissent illogiques aux yeux du généraliste — Arrêt Dunsmuir ne signifiait pas que l'insuffisance des motifs permettait à elle seule de casser une décision — Tribunaux ne devraient pas s'attendre à ce que les décideurs prennent en compte chacun des arguments avancés, chacune des dispositions législatives citées, chacune des décisions soumises ou tout autre détail ou tire une conclusion explicite sur chaque élément constitutif du raisonnement qui a mené à sa conclusion finale, du moment que les motifs permettent au tribunal siégeant en révision de comprendre le fondement de la décision et de déterminer si la décision faisait partie des issues acceptables — Dans le cadre d'un examen portant sur la norme de la décision raisonnable, la déférence est le principe directeur — Décision de la Cour en 1999 dans l'affaire Baker n'établissait pas que des motifs s'imposaient dans tous les cas, ni que leur qualité relevait de l'équité procédurale, et il était inutile de se fonder sur cette décision pour prétendre que les lacunes ou les vices dont seraient entachés les motifs appartenaient à la catégorie des manquements à l'obligation d'équité procédurale et qu'ils étaient soumis à la norme de la décision correcte — Conclusion que le raisonnement du tribunal n'était pas adéquatement exposé n'équivalait pas à un désaccord au sujet des conclusions tirées par celui-ci — Arbitre

a exposé ses motifs et il n'y avait aucun manquement à l'obligation d'équité procédurale, de sorte que le raisonnement de l'arbitre ou le résultat auquel il était arrivé devaient être examinés en fonction de la norme de la décision raisonnable — Pour les arbitres en relations de travail, il était courant de se livrer au simple exercice d'interprétation requis en l'espèce et il ne fallait pas s'attendre à ce que l'arbitre réponde à chaque argument possible ou expose toute analyse imaginable, puisque cela risquait de paralyser le processus d'arbitrage, lequel a pour fonction de résoudre les litiges avec célérité, tout en gardant en tête qu'un contrôle judiciaire et la négociation d'une nouvelle CC sont possibles.

Under the nurses' union collective agreement, casual nurses received a twenty percent wage premium in lieu of specified employment benefits from which they were excluded. One of those benefits was entitlement to vacation with pay. An arbitrator concluded that, under the collective agreement, members of the union could not use their years of service as casual employees for the purposes of calculating vacation entitlement when their employment status changed to permanent, temporary or part-time. On judicial review, the trial division judge set aside the arbitrator's award on the basis that the arbitrator's reasons were not sufficiently supported, and remitted the grievance to a new arbitrator. The trial division judge's decision was overturned by a majority of the Court of Appeal, which held that the arbitrator's minimal explanation indicated why the arbitrator reached the conclusion he did and satisfied the Dunsmuir criteria of justification, transparency and intelligibility. The Court of Appeal was of the opinion that the arbitrator's decision as a whole led to the reasonable conclusion that calculations to determine vacation entitlement for a permanent employee would not include service when the nurse was a casual employee because the employee was already compensated for that service and was explicitly excluded from the benefit of accruing time for the purposes of calculating his or her vacation entitlement under the collective agreement. The Court of Appeal concluded that the trial division judge erred in focusing on "how" the arbitrator reached his conclusion and failed to consider whether the arbitrator, at least minimally, explained "why" he had reached the conclusion he did. The Court of Appeal found that the arbitrator's decision fell within the range of possible, acceptable outcomes defensible in respect of the facts and the law, and that the trial division judge failed to read the arbitrator's decision as a whole and in context. The union appealed to the Supreme Court of Canada.

Held: The appeal was dismissed.

Per Abella J. (McLachlin C.J.C., LeBel, Deschamps, Fish, Rothstein, Cromwell JJ. concurring): The arbitrator in this case outlined the relevant facts, arguments, interpretive principles, and collective agreement provisions, and came to a conclusion that was well within the range of reasonable outcomes. It was important to understand that, when the Court in Dunsmuir called for justification, transparency and intelligibility in a decision-maker's reasons, it was recognizing that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, often using unique concepts and language and rendering decisions that were counterintuitive to a generalist. Read as a whole, Dunsmuir did not stand for the proposition that the adequacy of reasons was a stand-alone basis for

quashing a decision, or that a reviewing court should undertake two discrete analyses of the decision and the result. The reasons under review were to be read together with the outcome to determine whether the result fell within a range of possible outcomes. Although courts may, if necessary, look to the record to assess the reasonableness of the outcome, courts should not substitute their own reasons. Courts should not expect a decision-maker to include every argument, statutory provision, decision or other detail in their reasons, and a decision-maker was not required to make explicit findings on each constituent element leading to its final conclusion, provided the reasons allowed the reviewing court to understand why the decision was made and whether the decision was within the range of acceptable outcomes. Nor did the existence of an alternative interpretation of an agreement inevitably mean an arbitrator's decision should be set aside. When reviewing an administrative body's decision on the reasonableness standard, the guiding principle was deference.

The Court's 1999 decision in Baker did not stand for the proposition that reasons were always required, or that the quality of those reasons was a question of procedural fairness, and it was not helpful to suggest that, based on that decision, alleged deficiencies or flaws in reasons constituted a breach of the duty of procedural fairness triggering a correctness review. A finding that a tribunal's reasoning process was inadequately revealed was not to be confused with a disagreement over the tribunal's conclusions. The arbitrator in this case provided reasons and there was no breach of the duty of procedural fairness, so any challenge to the arbitrator's reasoning or result was to be made within the reasonableness analysis. The simple interpretive exercise before the arbitrator in this case was classic fare for labour arbitrators, and to expect an arbitrator in such circumstances to respond to every possible argument or line of analysis would paralyse the arbitration process which was directed at the speedy resolution of disputes with the knowledge that judicial review and negotiation of a new collective agreement were possible.

En vertu de la convention collective du syndicat des infirmières, les infirmières occasionnelles recevaient une somme équivalant à 20 pour cent de leur salaire de base plutôt que des avantages sociaux spécifiques auxquels elles n'avaient pas droit. Un de ces avantages était le droit à des vacances payées. Un arbitre a conclu qu'en vertu de la convention collective, les membres du syndicat ne pouvaient pas inclure leurs années de service à titre d'employés occasionnels dans le calcul servant à déterminer le droit aux congés lorsqu'ils atteignaient le statut d'employé permanent, temporaire ou à temps partiel. Lors du contrôle judiciaire, le juge de première instance a annulé la sentence arbitrale parce que les motifs exposés par l'arbitre n'étaient suffisamment étayés, et il a renvoyé le dossier à un nouvel arbitre. La décision du juge de première instance a été infirmée par les juges majoritaires de la Cour d'appel, lesquels ont conclu que les explications sommaires de l'arbitre permettaient de comprendre le fondement de sa décision et satisfaisaient aux critères de l'arrêt Dunsmuir, soit ceux de la justification de la décision ainsi que de la transparence et de l'intelligibilité du processus décisionnel. La Cour d'appel était d'avis que la décision de l'arbitre prise dans son ensemble permettait de parvenir à la conclusion raisonnable qu'on ne pourrait pas inclure

dans le calcul servant à déterminer si un employé permanent avait droit aux congés ses années de service à titre d'employé occasionnel puisque l'employé était d'ores et déjà compensé pour ce type de service et était explicitement exclu du programme d'avantages sociaux permettant de prendre en compte le temps couru pour déterminer s'il avait droit aux congés en vertu de la convention collective. La Cour d'appel a conclu que le juge de première instance avait commis une erreur en se concentrant sur la « manière » avec laquelle l'arbitre avait tiré ses conclusions et a négligé de se demander si l'arbitre avait expliqué, même sommairement, « pourquoi » il était parvenu à de telles conclusions. La Cour d'appel a conclu que la décision de l'arbitre faisait partie des issues possibles raisonnables, compte tenu des faits et du droit, et que le juge de première instance n'avait pas pris la décision de l'arbitre dans son ensemble et dans son contexte. Le syndicat a formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été rejeté.

Abella, J. (McLachlin, J.C.C., LeBel, Deschamps, Fish, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Dans sa décision, l'arbitre a énoncé les faits pertinents, les arguments des parties, les principes d'interprétation applicables ainsi que les dispositions pertinentes de la convention collective et en a tiré une conclusion qui faisait indubitablement partie des issues raisonnables. Ce qui était important de retenir, lorsque la Cour, dans l'arrêt Dunsmuir, a parlé de la justification de la décision, de la transparence et de l'intelligibilité du processus décisionnel, c'était qu'elle reconnaissait que le vaste éventail de décideurs spécialisés qui rendent couramment des décisions dans leurs sphères d'expertise ont souvent recours à des concepts et des termes particuliers et rendent des décisions qui apparaissent illogiques aux yeux du généraliste. Pris dans son ensemble, l'arrêt Dunsmuir ne signifiait pas que l'insuffisance des motifs permettait à elle seule de casser une décision, ou que les cours de révision doivent effectuer deux analyses distinctes, l'une portant sur les motifs et l'autre, sur le résultat. Les motifs faisant l'objet du contrôle judiciaire devaient être examinés en corrélation avec le résultat afin de savoir si ce dernier faisait partie des issues possibles. Bien que les tribunaux puissent, s'ils le jugent nécessaire, examiner le dossier pour apprécier le caractère raisonnable du résultat, ils ne devraient pas substituer leurs propres motifs à ceux de la décision sous examen. Les tribunaux ne devraient pas s'attendre à ce que les décideurs prennent en compte chacun des arguments avancés, chacune des dispositions législatives citées, chacune des décisions soumises ou tout autre détail dans leurs motifs, et un décideur n'est pas tenu de tirer une conclusion explicite sur chaque élément constitutif du raisonnement ayant mené à sa conclusion finale, du moment que les motifs permettent au tribunal siégeant en révision de comprendre le fondement de la décision et de déterminer si la décision faisait partie des issues acceptables. Pas plus que le fait que l'existence d'une interprétation différente puisse être donnée à une convention doive nécessairement entraîner l'annulation d'une décision d'un arbitre. La déférence est le principe directeur qui régit le contrôle de la décision d'un tribunal administratif selon la norme de la décision raisonnable. La décision de la Cour en 1999 dans l'affaire Baker n'établissait pas que des motifs s'imposaient dans tous les cas, ni que leur qualité relevait de l'équité procédurale, et il était

inutile de se fonder sur cette décision pour prétendre que les lacunes ou les vices dont seraient entachés les motifs appartenaient à la catégorie des manquements à l'obligation d'équité procédurale et qu'ils étaient soumis à la norme de la décision correcte. Il faut se garder de confondre la conclusion que le raisonnement du tribunal n'est pas adéquatement exposé et le désaccord au sujet des conclusions tirées par le tribunal. En l'espèce, l'arbitre a exposé ses motifs et il n'y avait aucun manquement à l'obligation d'équité procédurale, de sorte que le raisonnement de l'arbitre ou le résultat auquel il était arrivé devaient être examinés en fonction de la norme de la décision raisonnable. Pour les arbitres en relations de travail, il était courant de se livrer au simple exercice d'interprétation requis en l'espèce et il ne fallait pas s'attendre à ce qu'un arbitre placé dans de telles circonstances réponde à chaque argument possible ou expose toute analyse imaginable, puisque cela risquait de paralyser le processus d'arbitrage, lequel a pour fonction de résoudre les litiges avec célérité, tout en gardant en tête qu'un contrôle judiciaire et la négociation d'une nouvelle convention collective sont possibles.

Table of Authorities

Cases considered by *Abella J.*:

Baker v. Canada (Minister of Citizenship & Immigration) (1999), 1 Imm. L.R. (3d) 1, [1999] 2 S.C.R. 817, 14 Admin. L.R. (3d) 173, 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22 (S.C.C.) — followed

C.U.P.E., Local 963 v. New Brunswick Liquor Corp. (1979), 25 N.B.R. (2d) 237, [1979] 2 S.C.R. 227, 51 A.P.R. 237, 26 N.R. 341, 79 C.L.L.C. 14,209, 97 D.L.R. (3d) 417, N.B.L.L.C. 24259, 1979 CarswellNB 17, 1979 CarswellNB 17F (S.C.C.) — considered

Khosa v. Canada (Minister of Citizenship & Immigration) (2009), 82 Admin. L.R. (4th) 1, 2009 SCC 12, 2009 CarswellNat 434, 2009 CarswellNat 435, 304 D.L.R. (4th) 1, 77 Imm. L.R. (3d) 1, 385 N.R. 206, (sub nom. *Canada (Citizenship & Immigration) v. Khosa)* [2009] 1 S.C.R. 339 (S.C.C.) — referred to

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P.S.A.C. v. Canada Post Corp. (2010), (sub nom. *Canada Post Corp. v. PSAC)* [2011] 2 F.C.R. 221, 2010 CAF 56, 2010 CarswellNat 3242, (sub nom. *PSAC v. Canada Post Corp.)* 2010 C.C.L.C. 230-015, 2010 CarswellNat 416, 2010 FCA 56, 15 Admin. L.R. (5th) 157, (sub nom. *Canada Post Corp. v. Public Service Alliance of Canada)* 399 N.R. 127 (Fed. C.A.) — considered

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APPEAL by union from judgment reported at *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)* (2010), *(*sub nom. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board))* 294 Nfld. & P.E.I.R. 161, *(*sub nom. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board))* 908 A.P.R. 161, *(*sub nom. *Newfoundland & Labrador v. NLNU)* 2010 C.L.L.C. 220-017, 2010 NLCA 13, 2010 CarswellNfld 49, 190 L.A.C. (4th) 385 (N.L. C.A.).

POURVOI formé par le syndicat à l'encontre d'une décision publiée à *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)* (2010), *(*sub nom. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board))* 294 Nfld. & P.E.I.R. 161, *(*sub nom. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board))* 908 A.P.R. 161, *(*sub nom. *Newfoundland & Labrador v. NLNU)* 2010 C.L.L.C. 220-017, 2010 NLCA 13, 2010 CarswellNfld 49, 190 L.A.C. (4th) 385 (N.L. C.A.).

***Abella J.*:**

1 The transformative decision of this Court in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), explained that the purpose of reasons, when they are required, is to demonstrate "justification, transparency and intelligibility" (para. 47). The issues in this appeal are whether the arbitrator's reasons in this case satisfied these criteria and whether the reasons engaged procedural fairness.

2 The dispute underlying the arbitrator's award involved the calculation of vacation benefits. The arbitrator concluded that under the collective agreement, the grievors' time as casual employees was not to be included in calculating the length of their vacation entitlement when they became permanent employees.

3 The definition of "Employee" in the collective agreement includes all paid employees, including casual employees. Casual employees are defined in Article 2.01(b) as employees who work on an "occasional or intermittent basis". They are under "no obligation ... to come [to work] when they are called" and the Employer, in turn, has "no obligation" to call them.

4 Notably, that definitional provision states that while casual employees are generally entitled to the benefits of the collective agreement, they are *expressly excluded* from a number of benefits, including the vacation entitlement calculations applicable to permanent employees under Article 17. Instead, they receive 20 percent of their basic salary in lieu.

5 The issue the arbitrator had to decide was whether time as a casual employee could be credited towards annual leave entitlement if that employee became permanent. In the 12 page decision, the arbitrator outlined the facts, the arguments of the parties, the relevant provisions of the collective agreement, a number of applicable interpretive principles, and ultimately agreed with the Employer that the time an employee spent as a casual could not be used in calculating that employee's length of service towards vacation entitlement when he or she became a permanent, temporary or part-time employee.

6 The arbitrator reasoned that casual employees, defined in Article 2.01(b), work on an occasional, intermittent basis, and are not required to come to work even when called. Article 2.01(b) also sets out a list of benefits to which casual employees are *not* entitled. In lieu of those benefits, casual employees receive the benefit of 20 percent of their basic salary. One of the benefits from which they are expressly excluded and for which they receive the additional 20 percent is Article 17, which determines the length of vacation time to which an employee is entitled.

7 These points, it seems to me, provided a reasonable basis for the arbitrator's conclusion, based on a plain reading of the agreement itself.

8 On judicial review, the parties acknowledged that the standard of review was reasonableness. The chambers judge was of the view that such a review is based not only on whether the outcome falls within the range of possible outcomes, in accordance with *Dunsmuir*, but also requires that the reasons set out a line of analysis that reasonably supports the conclusion reached. The chambers judge concluded that the arbitrator's reasons required "more cogency" and that his conclusion was "unsupported by any chain of reasoning that could be considered reasonable". They were, in short, insufficient. As a result, the chambers judge found the result to be unreasonable and set it aside.

9 The majority in the Court of Appeal overturned the decision of the chambers judge, concluding that while "a more comprehensive explanation" would have been preferable, the reasons were "sufficient to satisfy the *Dunsmuir* criteria" of "justification, transparency and intelligibility". In their words:

> ... reasons must be sufficient to permit the parties to understand why the tribunal made the decision and to enable judicial review of that decision. The reasons should be read as a whole and in context, and must be such as to satisfy the reviewing court that the tribunal grappled with the substantive live issues necessary to dispose of the matter.

10 The dissenting judge agreed with the chambers judge. In her view, the arbitrator's reasons disclosed no line of reasoning which could lead to his conclusion. As a result, there were "no reasons" to review.

Analysis

11 It is worth repeating the key passages in *Dunsmuir* that frame this analysis:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decisionmaking process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> ... What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in respect for governmental decisions to create administrative bodies with delegated powers".... We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision".
>
> ... [Emphasis added; citations omitted; paras. 47-48.]

12 It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:

> "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to

> the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective.
>
> [Emphasis added.]
>
> (David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)

See also David Mullan, "*New Brunswick (Board of Management) v. Dunsmuir*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008), 21 *C.J.A.L.P.* 117, at p. 136; David Phillip Jones, Q.C., and Anne S. de Villars, Q.C., *Principles of Administrative Law* (5th ed. 2004), at p. 380; and *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.), at para. 63.

13 This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility". To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counterintuitive to a generalist. That was the basis for this Court's new direction in *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.), where Dickson J. urged restraint in assessing the decisions of specialized administrative tribunals. This decision oriented the Court towards granting greater deference to tribunals, shown in *Dunsmuir*'s conclusion that tribunals should "have a margin of appreciation within the range of acceptable and rational solutions" (para. 47).

14 Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at § 12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).

15 In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

16 Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*S.E.I.U., Local 333 v. Nipawin District Staff Nurses Assn.* (1973), [1975] 1 S.C.R. 382 (S.C.C.), at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

17 The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

18 Evans J.A. in *P.S.A.C. v. Canada Post Corp.*, 2010 FCA 56, [2011] 2 F.C.R. 221 (Fed. C.A.), explained in reasons upheld by this Court (2011 SCC 57 (S.C.C.)) that *Dunsmuir* seeks to "avoid an unduly formalistic approach to judicial review" (para. 164). He notes that "perfection is not the standard" and suggests that reviewing courts should ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision" (para. 163). I found the description by the Respondents in their Factum particularly helpful in explaining the nature of the exercise:

> When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum - the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. [para. 44]

19 The Union acknowledged that an arbitrator's interpretation of a collective agreement is subject to reasonableness. As I understand it, however, its argument before us was that since the arbitrator's reasons amounted to "no reasons", and since the duty to provide reasons is, according to *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), a question of procedural fairness, a correctness standard applies.

20 Procedural fairness was not raised either before the reviewing judge or the Court of Appeal and it can be easily disposed of here. *Baker* stands for the proposition that "in certain circumstances", the duty of procedural fairness will require "some form of reasons" for a decision (para. 43). It did not say that reasons were *always* required, and it did not say that the *quality* of those reasons is a question of procedural fairness. In fact, after finding that

reasons were required in the circumstances, the Court in *Baker* concluded that the mere notes of an immigration officer were sufficient to fulfil the duty of fairness (para. 44).

21 It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review. As Professor Philip Bryden has warned, "courts must be careful not to confuse a finding that a tribunal's reasoning process is inadequately revealed with disagreement over the conclusions reached by the tribunal on the evidence before it" ("Standards of Review and Sufficiency of Reasons: Some Practical Considerations" (2006), 19 *C.J.A.L.P.* 191, at p. 217; see also Grant Huscroft, "The Duty of Fairness: From Nicholson to Baker and Beyond", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (2008), 115, at p. 136).

22 It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.

23 The arbitrator in this case was called upon to engage in a simple interpretive exercise: Were casual employees entitled, *under the collective agreement*, to accumulate time towards vacation entitlements? This is classic fare for labour arbitrators. They are not writing for the courts, they are writing for the parties who have to live together for the duration of the agreement. Though not always easily realizable, the goal is to be as expeditious as possible.

24 As George W. Adams noted:

> The hallmarks of grievance arbitration are speed, economy and informality. Speedy dispute resolution is important to the maintenance of industrial peace and the ongoing economic needs of an enterprise. Adjudication that is too expensive contributes to industrial unrest by preventing the pursuit of meritorious grievances that individually involve small monetary values but collectively constitute a weathervane of employee satisfaction with the rules negotiated. The relative informality of grievance arbitration is facilitated by much less stringent procedural and evidentiary rules than those applicable to court proceedings. Informality permits direct participation by laymen, enhances the parties' understanding of the system and minimizes potential points of contention permitting everyone to focus on the merits of a dispute and any underlying problem....
>
> ... appeal to a higher authority by way of judicial review may be needed to correct egregious errors, to prevent undue extension of arbitral power and to integrate the narrow expertise of arbitrators into the general values of the legal system. The very existence of judicial review can be a healthy check on the improper exercise of arbitral responsibility and discretion.

(*Canadian Labour Law* (2nd ed. (loose-leaf)), at §§ 4.1100 to 4.1110)

25 Arbitration allows the parties to the agreement to resolve disputes as quickly as possible knowing that there is the relieving prospect not of judicial review, but of negotiating a new collective agreement with different terms at the end of two or three years. This process would be paralyzed if arbitrators were expected to respond to every argument or line of possible analysis.

26 In this case, the reasons showed that the arbitrator was alive to the question at issue and came to a result well within the range of reasonable outcomes. I would dismiss the appeal with costs.

Appeal dismissed.

Pourvoi rejeté.

TAB 5

2010 NLCA 12
Newfoundland and Labrador Court of Appeal

Burke v. N.A.P.E.

2010 CarswellNfld 48, 2010 NLCA 12, [2010] N.J. No. 62, 186 A.C.W.S. (3d) 227, 2010 C.L.L.C. 220-018, 294 Nfld. & P.E.I.R. 230, 908 A.P.R. 230

KEVIN BURKE (APPELLANT) AND NEWFOUNDLAND AND LABRADOR ASSOCIATION OF PUBLIC AND PRIVATE EMPLOYEES (FIRST RESPONDENT) AND MEMORIAL UNIVERSITY OF NEWFOUNDLAND (SECOND RESPONDENT) AND LABOUR RELATIONS BOARD (THIRD RESPONDENT)

C.K. Wells J.A., J. Derek Green C.J.N.L., and L.D. Barry J.A.

Heard: September 21-22, 2009
Judgment: February 18, 2010
Docket: 09/03

Proceedings: reversing *Burke v. N.L.A.P.P.E.* (2008), (sub nom. *Burke v. Newfoundland & Labrador Association of Public & Private Employees*) 284 Nfld. & P.E.I.R. 161, (sub nom. *Burke v. Newfoundland & Labrador Association of Public & Private Employees*) 875 A.P.R. 161, 167 C.L.R.B.R. (2d) 36, 2008 CarswellNfld 334, 2008 NLTD 199 (N.L. T.D.)

Counsel: Appellant for himself
Sheila Greene, Q.C. for First Respondent
Twila E. Reid for Second Respondent
Ernest Boone, Q.C. for Third Respondent

Subject: Labour; Public
Related Abridgment Classifications
Administrative law
III Requirements of natural justice
III.1 Right to hearing
III.1.c Procedural rights at hearing
III.1.c.vi Reasons for decision
Administrative law
IV Standard of review
IV.3 Reasonableness
IV.3.a Reasonableness simpliciter

Labour and employment law
I Labour law
I.1 Labour relations boards
I.1.e Judicial review
I.1.e.ii Availability of review
I.1.e.ii.B Standard of review
Labour and employment law
I Labour law
I.10 Discipline and termination
I.10.d Kinds of discipline
I.10.d.xiv Last chance agreement

Headnote

Labour and employment law --- Labour law — Labour relations boards — Practice and procedure — Content of decision

Union and employer negotiated last chance agreement providing that employee would be provided with last chance to improve attendance at work, and that if he exceeded 56 hours of intermittent sick leave, it would be grounds for immediate termination — Employer subsequently purported to terminate employee and union grieved — Arbitrator reinstated employee and ordered that new last chance agreement be executed containing usual terms and conditions — Parties could not agree on terms of second last chance agreement and matter was referred to second arbitrator — Second arbitrator accepted employer's proposed draft last chance agreement with modifications — Employee filed complaint against union with labour relations board alleging that union processed his grievance in superficial and careless manner, which caused flaws in second last chance agreement — Employee attached to complaint, a letter that he'd written to union complaining that no precedents of last chance agreements were submitted to second arbitrator and that union had not conveyed to him employer's offer to meet to discuss resolution of terms of last chance agreement — Employee referred to provision in collective agreement that prohibited agreement between employer and employee that conflicted with collective agreement — Union and employer did not respond directly to employee's points — Board dismissed complaint, describing complaint as disjointed and vague — Employee's application for judicial review was dismissed — Employee appealed — Appeal allowed; matter remitted to board — Applications judge erred in not concluding that failure of board to consider employee's specific allegations in context of actions of union in period leading up to and during second arbitration was unreasonable decision — Board rightly decided that it was limited to considering whether union did not properly handle grievance in relation to second arbitration but ranged over complete history of whole dispute — Board did not indicate that it addressed any of employee's specific allegations — Decision did not meet standard of justification, transparency and intelligibility — Requirement of responding to essential arguments presented was especially important

where party was self-represented — Decision that was unresponsive to case presented had to be considered unreasonable decision.

Administrative law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Reasons for decision

Union and employer negotiated last chance agreement providing that employee would be provided with last chance to improve attendance at work and that if he exceeded 56 hours of intermittent sick leave, it would be grounds for immediate termination — Employer subsequently purported to terminate employee and union grieved — Arbitrator reinstated employee and ordered that new last chance agreement be executed containing usual terms and conditions — Parties could not agree on terms of second last chance agreement and matter was referred to second arbitrator — Second arbitrator accepted employer's proposed draft last chance agreement with modifications — Employee filed complaint against union with labour relations board alleging that union processed his grievance in superficial and careless manner, which caused flaws in second last chance agreement — Employee attached to complaint, a letter he wrote to union complaining that no precedents of last chance agreements were submitted to second arbitrator and that union had not conveyed to him employer's offer to meet to discuss resolution of terms of last chance agreement — Employee referred to provision in collective agreement that prohibited agreement between employer and employee that conflicted with collective agreement — Union and employer did not respond directly to employee's points — Board dismissed complaint, describing complaint as disjointed and vague — Employee's application for judicial review was dismissed — Employee appealed — Appeal allowed; matter remitted to board — Applications judge erred in not concluding that failure of board to consider employee's specific allegations in context of actions of union in period leading up to and during second arbitration was unreasonable decision — Board rightly decided that it was limited to considering whether union did not properly handle grievance in relation to second arbitration, but ranged over complete history of whole dispute — Board did not indicate that it addressed any of employee's specific allegations — Decision did not meet standard of justification, transparency and intelligibility — Requirement of responding to essential arguments presented was especially important where party was self-represented — Decision that was unresponsive to case presented had to be considered unreasonable decision.

Labour and employment law --- Labour law — Labour relations boards — Judicial review — Availability of review — Standard of review

Reasonableness.

Administrative law --- Standard of review — Reasonableness — Reasonableness simpliciter

The union filed a grievance after the employee received a letter from his employer regarding his use of sick leave. The union and the employer negotiated a last chance agreement providing that the employee would be provided with a last chance to improve his attendance at work and that if he should exceed 56 hours of intermittent sick leave, it would be grounds for immediate termination. The employer subsequently purported to terminate employee.

The union grieved the termination. The arbitrator ordered that the employee be reinstated and that a new last chance agreement be executed containing the usual terms and conditions. The union and employer did not agree on the terms of the new last chance agreement and the matter was referred to a second arbitrator. No witnesses were called and no examples of usual terms and conditions of last chance agreements were provided to the arbitrator. The arbitrator accepted the employer's proposed draft but modified it to exclude a provision that the union would not pursue any grievances on behalf of the employee.

The employee filed a complaint with the labour relations board alleging that the union processed his grievance in a superficial or careless manner which caused flaws in the new last chance agreement. The employee attached a letter he wrote to the union complaining that no other precedents of last chance agreements were submitted to the arbitrator, and that the union had not conveyed to him the employer's offer to meet to discuss a resolution of the terms of the last chance agreement. The employee referred to a provision of the collective agreement that prohibited any agreements between the employer and an individual employee that were in conflict with the collective agreement. None of the responses of the union or the employer directly addressed the employee's points.

The board dismissed the complaint. The board described the complaint as disjointed and vague. The board stated that the union demonstrated a caring attitude and there was no flagrant error specifically alleged by the employee or discovered in the course of the investigation. The board concluded that there was ample evidence in the documents filed to show that the union fulfilled its duty of fair representation with respect to the handling of the employee's grievance.

The employee unsuccessfully applied for judicial review of the board's decision. The applications judge concluded that the board properly directed itself on the law and the board's conclusions were reasonable.

The employee appealed.

Held: The appeal was allowed. The matter was remitted to the board.

Per Green C.J.N.L. (Wells J.A. concurring): The applications judge erred in not concluding that the failure of the board to consider the employee's specific allegations in the context of the actions of the union in the period leading up to and during the second arbitration was an unreasonable decision.

The board rightly decided that it was limited to considering whether the union did not properly handle the grievance in relation to the second arbitration. However, the board ranged over the complete history of the whole dispute. It was unclear whether the board would have come to the same conclusion if it had focused on the union's actions and inactions within the time frame related to the employee's specific allegations.

The board did not indicate that it addressed any of the specific allegations made by the employee. On a careful reading of the employee's complaint, his statements to the investigating officer and in his reply, the employee did make specific allegations of arbitrary behaviour. The board did not identify what it believed the employee's allegations of

superficial or careless behaviour to be. Because the board did not engage in any analysis of the specific allegations, it was not possible from the reasons of the board to determine that the employee's points were appreciated and taken into account. Where it appeared that the board did not address the essential submissions, it could not be said that the decision met the standard of justification, transparency and intelligibility. The requirement of responding to the essential arguments presented was especially important where a party was self-represented.

By simply presenting conclusory statements and relying on actions of the union outside the relevant period as evidence of its non-arbitrary behaviour, the way in which the board approached the matter gave no confidence that it properly discharged its responsibility. A decision that was unresponsive to the case presented had to be considered an unreasonable decision.

The applications judge fell into the traps into which the board had fallen.

It was inappropriate for the matter to be examined anew by the court to determine whether the result was nevertheless reasonable. To do so would involve the court making a decision that the board was entrusted by statute with doing. The record did not permit it and it could not be said that no outcome other than the one reached by the board was possible.

Per Barry J.A. (concurring): The employee's two arguments meriting consideration were obscured by his clearly unsupportable propositions. Despite the difficulty in teasing out the essence of the employee's claim, the board had an obligation to use its best efforts to understand and address the employee's arguments that he should have had an opportunity to discuss settlement with the employer and that an inadequate presentation by the bargaining agent permitted the arbitrator to arrive at wording for the last chance agreement that was too unclear to protect him from arbitrary termination by his employer.

Because it was not clear that no other outcome was possible, the matter had to be remitted to the board for further consideration. It was for the board to determine whether the approach of the bargaining agent was superficial or adequate.

Table of Authorities

Cases considered by *J. Derek Green C.J.N.L.*:

C.J.A., Local 579 v. Northland Contracting Inc. (2006), 261 Nfld. & P.E.I.R. 256, 790 A.P.R. 256, 2006 NLCA 11, 2006 CarswellNfld 56, 119 C.L.R.B.R. (2d) 303 (N.L. C.A.) — referred to

Clifford v. Ontario (Attorney General) (2009), 93 Admin. L.R. (4th) 131, 2009 ONCA 670, 2009 CarswellOnt 5595, 2009 C.E.B. & P.G.R. 8359, 98 O.R. (3d) 210, 76 C.C.P.B. 184 (Ont. C.A.) — considered

Macdonald v. Mineral Springs Hospital (2008), 2008 ABCA 273, 2008 CarswellAlta 1089, 295 D.L.R. (4th) 609, 94 Alta. L.R. (4th) 317, 437 A.R. 7, 433 W.A.C. 7 (Alta. C.A.) — considered

New Brunswick (Board of Management) v. Dunsmuir (2008), 372 N.R. 1, 69 Admin. L.R. (4th) 1, 69 Imm. L.R. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) [2008] 1 S.C.R. 190,

844 A.P.R. 1, (sub nom. *Dunsmuir v. New Brunswick*) 2008 C.L.L.C. 220-020, D.T.E. 2008T-223, 329 N.B.R. (2d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 170 L.A.C. (4th) 1, (sub nom. *Dunsmuir v. New Brunswick*) 291 D.L.R. (4th) 577, 2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 64 C.C.E.L. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 95 L.C.R. 65 (S.C.C.) — followed

Petro-Canada v. British Columbia (Workers' Compensation Board) (2009), 2009 CarswellBC 2416, 2009 BCCA 396, 98 B.C.L.R. (4th) 1 (B.C. C.A.) — considered

United States v. Lake (2008), 72 Admin. L.R. (4th) 30, (sub nom. *Lake v. Canada (Minister of Justice)*) 236 O.A.C. 371, (sub nom. *Lake v. Canada (Minister of Justice)*) 171 C.R.R. (2d) 280, 2008 SCC 23, 2008 CarswellOnt 2574, 2008 CarswellOnt 2575, (sub nom. *Lake v. Canada (Minister of Justice)*) 373 N.R. 339, 56 C.R. (6th) 336, 230 C.C.C. (3d) 449, (sub nom. *United States of America v. Lake*) 292 D.L.R. (4th) 193, (sub nom. *Lake v. Canada (Minister of Justice)*) [2008] 1 S.C.R. 761 (S.C.C.) — considered

Statutes considered by *J. Derek Green C.J.N.L.*:

Labour Relations Act, R.S.N. 1990, c. L-1

s. 12(1) — referred to

s. 130 — considered

s. 130(1) — referred to

APPEAL by employee from judgment reported at *Burke v. N.L.A.P.P.E.* (2008), (sub nom. *Burke v. Newfoundland & Labrador Association of Public & Private Employees*) 284 Nfld. & P.E.I.R. 161, (sub nom. *Burke v. Newfoundland & Labrador Association of Public & Private Employees*) 875 A.P.R. 161, 167 C.L.R.B.R. (2d) 36, 2008 CarswellNfld 334, 2008 NLTD 199 (N.L. T.D.), refusing to set aside decision of Labour Relations Board to reject employee's claim that union breached its duty of representation.

***J. Derek Green C.J.N.L.*:**

1 The issue on this appeal is whether a judge of the Trial Division erred in refusing, on judicial review, to set aside a decision of the Newfoundland and Labrador Labour Relations Board which had rejected the appellant's claim under s. 130 of the *Labour Relations Act* that his union, Newfoundland and Labrador Association of Public and Private Employees (the union) had acted in a manner that was arbitrary, discriminatory or in bad faith in representing him with respect to the processing of a grievance he had filed against his employer, Memorial University of Newfoundland (the university).

Background

2 The history of this matter is lengthy and convoluted. It is necessary, however, to recite some of it, as an element of the argument on this appeal involves the submission that previous

proceedings arising out of this matter improperly influenced the decision under appeal. The background may be summarized in defined segments.

(a) The 2004 "Last Chance" Agreement

3 The appellant, Kevin Burke, had been employed by the university as a custodian since 1998. Issues surrounding sick leave and job attendance have been present since at least 2003. In April of 2003, Mr. Burke received a letter from his employer regarding his use of sick leave. His union filed a grievance on his behalf. Other letters followed.

4 Ultimately the union and the employer negotiated a "last chance agreement" that was signed by all parties, including Mr. Burke. In essence, the agreement provided that, to address "excessive absenteeism" Mr. Burke would be provided with "a last chance" to improve his attendance at work and that if he should exceed 56 hours of intermittent sick leave, it would be grounds for "immediate termination". The details of the wording of the agreement were, however, a matter of considerable debate before finalization.

5 Central to the debate was the employer's proposed inclusion of the words "for any reason" when describing exceeding 56 hours as the standard for immediate termination. Mr. Burke was adamant that those words should be removed because he felt it would be unfair to penalize him if he had legitimate reasons for being off work for illness. In particular, he had complained on a number of occasions about what he alleged were unsafe environmental working conditions that were causing health problems for him. In the end, the words were removed from the agreement as ultimately signed.

(b) The 2005 termination and grievance

6 Issues concerning what the university regarded as excessive sick leave continued to present themselves after the signing of the last chance agreement. The university issued a letter to Mr. Burke on May 20, 2005 purporting to terminate him from his employment. Mr. Burke requested his union to grieve the termination. Although initially an employee relations officer with the union had commenced processing the grievance towards arbitration, he was subsequently countermanded by another union officer who wrote Mr. Burke that "this grievance has no chance of succeeding in arbitration and therefore should not proceed".

7 Mr. Burke persisted and appealed this decision to the union executive. Ultimately, the president of the union, upon legal advice, conceded that the 2004 last chance agreement did not preclude Mr. Burke's ability to proceed to arbitration and that there might be points he could raise that would be relevant at the arbitration.

(c) The Browne Arbitration Award

8 The grievance proceeded to arbitration in front of a single arbitrator, Dennis M. Browne, Q.C. Mr. Burke, who was personally present and gave evidence at the hearing, was represented by an employee relations officer from the union.

9 The arbitrator reviewed the warning letters that Mr. Burke had received since 2003 leading up to the execution of the 2004 last chance agreement as well as events in Mr. Burke's life that had occurred thereafter. He noted that in 2004 and 2005 "the Grievor was experiencing difficulties which were not related to the workplace, but nonetheless were of some magnitude". He observed that the dismissal was "non-disciplinary" and that it occurred as a result of excessive absenteeism following the last chance agreement. He concluded that:

> I am satisfied that if the Employer had been fully aware of all the extraordinary events in the Grievor's life at the time the Grievor was attempting to abide by the terms of the Last Chance Agreement, termination would not have been the result. I am equally satisfied that the evidence as it relates to the Grievor's personal circumstances provides a compelling reason for intervention in this instance.

10 As a result, the arbitrator allowed the grievance and ordered that Mr. Burke be reinstated but only on certain conditions:

> The Grievor is to provide the Employer with a medical certificate which clearly states that he is fit to work his shifts and to resume all duties as a Custodian I. A new Last Chance Agreement *containing the usual terms and conditions* shall be executed. Over the life of the new Last Chance Agreement no existing grievances are to be pursued by the Union pertaining to this particular Grievor.
>
> [Italics added]

11 Mr. Burke was not satisfied with the result and asked the union to seek judicial review of the award. The president of the union, after consulting legal counsel and the employee relations officer who had represented Mr. Burke at the arbitration, rejected the request. The president took the position that there was no chance of success, that the university would likely "cross appeal", and that the result would be overturned and the dismissal upheld.

12 Meanwhile, negotiations were underway to settle the terms of the last chance agreement. Difficulties arose. Mr. Burke proposed a draft which he called a "return to work agreement" and which provided that the terms of the agreement were subservient to the terms of the collective agreement. The university took the position that that would not be in accord with the spirit of a last chance agreement which was intended to provide its own mechanism for dealing with an acknowledged, already-existing, violation of the collective agreement. Mr. Burke countered, in a position developed further before this court, that the nature of a

collective bargaining regime is such that employers are not entitled to make "side deals" with individual employees and that, therefore, a last chance agreement that did not recognize the supremacy of the collective agreement was illegal.

13 Agreement could not be reached on the wording of the last chance agreement. A weakness of the Browne arbitration award was that the arbitrator did not give any indication of what he had in mind when he stipulated that the agreement be on "usual terms and conditions". Nobody else seemed to know what that meant either.

14 The union and the university therefore agreed to refer the settlement of the agreement terms back to another arbitrator, John Clarke.

(d) The First Labour Relations Board Application

15 Unhappy with the way things were proceeding, on January 22, 2007 Mr. Burke filed a complaint with the Labour Relations Board under s. 130 of the *Labour Relations Act* alleging, in the words of s. 130, that the union had acted "in a manner that is arbitrary, discriminatory or in bad faith in the handling of [the] grievance". In particular, he claimed that the union improperly refused to "appeal" the decision or to seek a clarification from the arbitrator as to whether the last chance agreement as proposed by the university would take away his rights under the collective agreement and deny him his rights to pursue existing grievances.

16 On March 30, 2007 the Board rejected Mr. Burke's complaint without an oral hearing and declared that the union had not acted in a manner that was arbitrary, discriminatory or in bad faith in the handling of the grievance. It did not, however, file its reasons for the decision until after the arbitration hearing held before John Clarke for the purpose of settling the terms of the last chance agreement ordered by arbitrator Browne.

17 Between the time of the Labour Relations Board's order in March and the hearing before arbitrator Clarke, Mr. Burke applied to the Trial Division for judicial review of the Board decision dismissing his complaint. That matter was heard before Orsborn J. after the conclusion of the Clarke arbitration hearing and after the reasons for the Board's order had been released. Orsborn J. denied the relief sought. He concluded that even if he reviewed the Board's decision on a standard of correctness, a standard which he called "extreme", he was not satisfied that the Board had committed any reversible error. He noted that although the actual ruling in the Browne arbitration was not completely to Mr. Burke's liking, "in general terms it was considered successful in that the arbitrator ordered reinstatement [with] conditions". He agreed with the Board that Mr. Burke, as the party having the burden of proof, had not produced any actual evidence of bad faith, discriminatory conduct or arbitrary behaviour.

(e) Other relevant intervening events

18 On February 19, 2007, Lisa Hollett, Director of Human Resources at the university, wrote the union stating:

> In order to reach a resolution without incurring the time delay and expense of referring the matter to another arbitrator, I suggest that Mr. Burke, Mr. Horlick [the University's representative], yourself [Chris Henley, union employee relations officer] and I meet to discuss the "Last Chance Agreement" as defined by Arbitrator Browne.

19 Ms. Hollett went on to say that "in the event Mr. Burke is not prepared to meet", the matter should be referred to another arbitrator as soon as possible". The union did not take Ms. Hollett up on her offer to discuss a resolution and did not tell Mr. Burke of the existence of this letter until three months later - after the time when his complaint to the Labour Relations Board had been heard and decided.

(f) The Clarke Arbitration Award

20 As a result of there being no meeting, in accordance with Lisa Hollett's suggestion, to attempt to resolve the terms of the last chance agreement, as required by the Browne award, the matter was referred to arbitration, as noted above.

21 Mr. Burke applied, over the objection of the union, to be recognized as an interested party in the proceeding with the right to be heard directly. He took the position that his interests had not been properly represented by his union. To ensure that the points he felt were relevant were made to the arbitrator, it was necessary, in his view, that he participate directly.

22 The arbitrator rejected this request, ruling all grievances under the collective agreement must be "initiated and brought forth by the union on behalf of the employees" and that there was therefore "no place for the intervention of the Grievor as his interests are represented herein by the union."

23 No witnesses were called by either the union or the university. The 2004 last chance agreement as well as the current draft proposed by the university and Mr. Burke's proposed "return to work agreement" were entered as exhibits. No examples of "usual terms and conditions" of last chance agreements were provided to the arbitrator. As a result, the arbitrator described his duty as "a somewhat onerous task in light of the lack of precedent provided between these parties".

24 The arbitrator also noted that what happened between the period when Mr. Burke proposed his "return to work" agreement and when the matter was referred back to arbitration was "not entirely clear". In light of this comment and the fact that there is no

further reference in his award to the reasons Mr. Burke had been giving for not signing the last chance agreement proposed by the university, it can be concluded, for the purpose of this appeal, that Mr. Burke's specific objections to the wording of the university's proposal were not placed before the arbitrator by the union.

25 The arbitrator observed that the only last chance agreement put in evidence with which he could make a comparison in determining what the current terms should be was the 2004 last chance agreement. He concluded that the situation that led to the 2004 last chance agreement (excessive sick leave usage followed by several warnings from the employer) was "similar to the one at hand" and that "one could expect therefore that usual terms and conditions of these two agreements would be similar". He therefore adopted the approach of comparing the university's proposed draft with the 2004 agreement in the light of the arguments made by the university and the union in order to reach an agreement which would represent the "usual terms and conditions".

26 The base of comparison was therefore the 2004 agreement. That position seemed to be accepted by everybody except Mr. Burke. He wanted the arbitrator to understand the background that led up to the compromise that resulted in the 2004 agreement and how the wording came to be settled. There is nothing in the arbitrator's award to indicate that those issues figured into the presentations.

27 The arbitrator essentially accepted the university's proposed draft but modified it to exclude a provision that the union would not pursue any grievances on behalf of Mr. Burke (because the Browne award had already stipulated only that no "existing" grievances would be pursued) and adjusted the date when the time during which the agreement would remain in Mr. Burke's employment file would begin to run.

28 Neither the union, nor Mr. Burke personally, sought judicial review of the award.

(g) The Second Labour Relations Board Application

29 Mr. Burke did, however, file another complaint with the Labour Relations Board under s. 130 of the *Labour Relations Act* on December 3, 2007. It is the decision resulting from this application that was the subject of the judicial review decision of the Trial Division that is at issue in the current appeal.

30 Mr. Burke's complaint was initially rejected by the Board because it lacked any particulars. The Board also pointed out that Mr. Burke appeared to be challenging the way the union had handled the grievance before arbitrator Browne (a matter that already had been dealt with by the previous application to the Board) and also was claiming that he was aggrieved by arbitrator Clarke's award (a matter outside the Board's jurisdiction).

31 Mr. Burke subsequently submitted an amended complaint on December 17, 2007 in which he alleged that the union processed his grievance "in a superficial or careless manner" and that "the process used in determining the usual terms and conditions to be set forth in the Last Chance Agreement has flaws caused by the superficial or careless manner in which my union handled that part of my grievance, and I was disadvantaged by these flaws". He went on to attach a letter he had written to Mr. Chris Henley, the employee relations officer of the union with whom he had been dealing, complaining that no other precedents of types of last chance agreements had been submitted to arbitrator Clarke and that the union had not conveyed to him Lisa Hollett's suggestion that there be a meeting to discuss possible resolution of the terms of the agreement. Mr. Burke also referred to a provision of the collective agreement that prohibited any agreements between the employer and an individual employee that was in conflict with the collective agreement.

32 In reply to the complaint, the union submitted that its essence was a complaint about the handling of the grievance before arbitrator Browne or an attack on the correctness of the Clarke award and that both matters were not properly before the Board for consideration. These positions were also supported by the university. The union also stated that it did not know what "flaws" in the procedure Mr. Burke was alleging.

33 Mr. Burke filed a response to the union's and the university's replies. In it he reiterated his complaint that the union had not submitted other examples of last chance agreements to arbitrator Clarke and that no attempt had been made to explain the background of how the wording of the 2004 agreement had been arrived at. He also cited as an example of "carelessness" on the union's part the fact that Chris Henley had not told him of the offer from the university to meet to discuss resolution of the terms of the agreement instead of going to arbitration.

34 He reiterated much the same points to the Board officer who was mandated to conduct an investigation into the complaint and in his further submission in response to the board officer's report. He also argued that the "flaws" in the union's presentation at the Clarke arbitration included: not calling any witnesses, including himself; not allowing him to speak; not having the employee relations officer who represented the union at the Browne arbitration (who was familiar with the background) present at the Clarke arbitration to have him make the presentation instead of Chris Henley; and not putting forward other examples of last chance agreements (even though Chris Henley stated at the hearing that he was aware of at least 14 other last chance agreements and not one had the same terms and conditions as the existing agreement).

35 He also alleged that the refusal of Chris Henley to put forward evidence as to the background leading up to the settlement of the 2004 agreement (including Mr. Burke's

concern that including in the agreement a provision that failure to abide by the agreement would constitute immediate grounds for dismissal improperly took away his rights under the collective agreement) was "arbitrary" and that Henley "acted in an arbitrary manner" in not responding to the university's offer of a resolution meeting and in not telling Mr. Burke of its existence until three months later.

36 In its reply to the board officer's report, the university reasserted that the complaint was an attempt to reargue the issues dealt with in the Browne arbitration or to challenge the correctness of the Clarke award, both of which were beyond the Board's jurisdiction to consider.

37 None of the responses of the union or the university directly addressed the points that Mr. Burke was making about what he believed was arbitrary behaviour on the part of the union in the conduct of the Clarke arbitration.

(h) The Labour Relations Board Decision

38 The Board ruled that it had no authority or jurisdiction to deal with: (i) matters that had been the subject of the first complaint to the Board in relation to the union's handling of the Browne arbitration (the Board's decision having been challenged by Mr. Burke and upheld on judicial review); or (ii) challenges to the correctness of the Clarke arbitration award (because s. 130 did not allow such a challenge and in any event no judicial review had been sought of that award).

39 What was left for the Board to consider were Mr. Burke's complaints that the union did not handle the processing of the grievance properly in relation to the Clarke arbitration. The Board stated the issue before it to be: "whether the Respondent [union] acted in a manner that was arbitrary, discriminatory or in bad faith in the handling of the grievance in accordance with s. 130 (1) of the Act" and in respect of that issue, the Board described Mr. Burke's complaint as one in which the union "processed his grievance/complaint in a superficial or careless manner".

40 The Board noted that terms like "implausible", "so reckless as to be unworthy of protection", "unreasonable", "capricious", "negligent" and "demonstrative of a non-caring attitude" have been used in Board jurisprudence to describe the meaning of "arbitrary". On the other hand, an honest mistake, an error in judgment or even simple negligence, are not enough.

41 The Board also noted that in addition to alleging that the process had "flaws caused by the superficial or careless manner" in which the union handled the grievance, Mr. Burke had made "further allegations" about the "flawed" presentation to the Board's investigating officer. The Board stated that the Board "considered it fit" that those allegations should be

considered in the analysis of Mr. Burke's complaint. The Board did not, however, identify what the Board considered those specific allegations to be nor did it engage in any analysis of any of the allegations.

42 The Board described Mr. Burke's complaint as "disjointed and vague". It returned to the fact that Mr. Burke had made allegations about the handling of the Browne arbitration and that Mr. Burke was "unhappy" with the Clarke decision. The Board then reiterated that the issues regarding the handling of the grievance before Browne were *res judicata* and that the Board had no jurisdiction to review the Clarke award. It then concluded:

> ... there was ample evidence in the documents filed in relation to the Burke complaint to show that the respondent union has fulfilled its duty of fair representation with respect to the handling of Mr. Burke's grievance.
>
> Can it be said then that the respondent Union acted in a manner that was arbitrary, discriminatory or in bad faith in the handling of Mr. Burke's grievances within the meaning of s. 130(1) of the Act? Absolutely not. It is the Board's view that the contrary is true. The Respondent Union has accommodated Mr. Burke at every turn.

43 As support for these conclusory statements, the Board then engaged in a recitation of all the procedural steps that had occurred since the initial issue arose in 2003 - before the events leading to the Browne arbitration. The Board noted various steps the union took to assist in the processing of the grievance (e.g. "... in no small part due to the efforts of the union ...") and noted various circumstances where Mr. Burke "refused" to do certain things. The Board then concluded:

> The respondent Union has grieved on Mr. Burke's behalf, has referred the matter to arbitration, not once but twice, has sought judicial review of orders of this Board [this last phrase is incorrect; the Board subsequently issued a correction deleting this phrase] and in the opinion of this Board has accommodated Mr. Burke to a far greater extent than one might expect. The Union has demonstrated a caring attitude in the circumstances of this case. I fail to see how it can be said that the Union made a mistake or was negligent in the handling of Mr. Burke's grievance or complaints, of which there were many. There is no flagrant error specifically alleged by Mr. Burke or discovered in the course of the investigation.

44 As a result, the Board dismissed Mr. Burke's complaint. Mr. Burke sought judicial review of the decision.

The Trial Division Decision - 2008 NLTD 199, 284 Nfld. & P.E.I.R. 161 (N.L. T.D.)

45 The Trial Division judge concluded that the standard of review of the Board's decision was reasonableness. She concluded that the Board properly directed itself on the law with respect to the interpretation of s. 130. She further decided that the Board had correctly concluded that the issue before the Board was limited to consideration of the union's handling of the grievance subsequent to the Browne award and that it could not review the substance of the Clarke award. She did, however, review the history of the matter since the events of 2003.

46 She stated:

> [32] ... I am satisfied the Board properly directed itself on the law as set out in Section 130 of the *Labour Relations Act* as well as the common law definitions of the terms found in the section, that is, arbitrary, discriminatory and bad faith. Having properly directed its mind to the law the Board then embarked on an analysis of the treatment of Burke by [the union]

47 The judge referred to the Board's conclusion that the union "has demonstrated a caring attitude", had made no mistakes and did not act negligently in processing Mr. Burke's grievance or complaints and then simply stated:

> [33] ... Based on the record and the analysis of the Board which Board had fully canvassed the law in the area I find its conclusions to be reasonable. Burke failed to place before the Board evidence of NAPE having acted in an arbitrary, discriminatory or bad faith manner. Accordingly, the Board did not breach its duty to Burke as set out in s. 130 of the *Labour Relations Act*.

48 Accordingly, she dismissed the application for judicial review. It is the correctness of that decision that is the subject of this appeal.

Considerations

(a) Standard of Appellate Review

49 The standard of review by this Court of the decision of the applications judge on the choice of standard applicable on judicial review, or the application of that standard, is one of correctness. See, *C.J.A., Local 579 v. Northland Contracting Inc.* (2006), 261 Nfld. & P.E.I.R. 256 (N.L. C.A.) per Mercer J.A. at paras 14, 23; *Macdonald v. Mineral Springs Hospital*, 2008 ABCA 273 (Alta. C.A.), per Hunt J.A. at para. 19.

50 In the current context, that means that this Court will examine the decision of the applications judge to determine whether the judge was correct in her choice of the applicable standard of review and the application of that standard in dismissing the application for judicial review. In other words do we agree, applying the appropriate standard of judicial

review (determined by the applications judge to be a reasonableness standard), that the decision reached by the applications judge is one that this Court would have reached? If not, we will substitute our decision for that of the applications judge.

51 The parties agree that the judge chose the correct standard of judicial review (reasonableness) to apply to the Board's decision. I also agree. The real issue here is whether the judge's *application* of that standard to the Board's decision was correct.

52 In *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190 (S.C.C.), Bastarache and LeBel JJ., writing for the majority, described the application of the reasonableness standard this way:

> [47] ... A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

53 The question in this case is whether, in concluding that the Board's decision was reasonable, the applications judge correctly applied the reasonableness standard. The analysis is described in *Dunsmuir* as having a two-pronged approach; first, to analyze the Board's reasons for decision to determine whether they satisfy the requirements of justification, transparency and intelligibility and then to address whether the decision falls within a range of possible acceptable outcomes which are defensible in respect of facts and law. With that analysis as background, the correctness of the applications judge's decision will then be brought into focus.

(b) Analysis of the Board's decision

54 The Board rightly decided that it was limited to considering whether the union did not properly handle the grievance in relation to the Clarke arbitration. The correctness of the Browne and Clarke awards and the handling of the grievance up to and including the Browne award were outside the Board's jurisdiction to deal with the current complaint.

55 Having decided that the issues at stake were limited to a consideration of the union's handling of the grievance following the Browne award, the Board concluded, as noted previously, that the union had "demonstrated a caring attitude" towards how it handled Mr. Burke's grievance and that it had acted fairly and properly. By way of support for this conclusion, however, the Board ranged over the complete history of the whole dispute and did not confine itself to a consideration of the handling by the union of the Clarke arbitration alone.

56 By focusing on the behaviour of the union in handling the grievance from the time that the absenteeism issue arose in 2003 and throughout the negotiation of the initial last chance agreement and the handling of the Browne arbitration, the Board appears to have become diverted from consideration of Mr. Burke's specific allegations regarding the handling of the grievance in relation to the Clarke arbitration. In fairness to the Board, this may have resulted from the disjointed nature of Mr. Burke's submissions.

57 As the Board itself correctly noted, the issue before the Board only related to the handling of the grievance in the period following the Browne award leading up to, and during, the Clarke arbitration. It is unclear from the Board's analysis whether it would have come to the same conclusion if it had focused on the union's action and inactions within the time frame related to the specific allegations made by Mr. Burke and, in so doing, had given specific consideration to those allegations.

58 The union may well have acted appropriately (as the Board, indeed, had earlier found during the first Board application), in the handling of all matters up to the conclusion of the Browne arbitration; however, the fact that the union did so act does not absolve it from continuing to act in good faith, without discrimination or arbitrariness in the processing of the grievance through to its conclusion in the Clarke arbitration. To determine that, it is necessary to consider carefully how the union acted, post-Browne.

59 Whether it did act appropriately, of course, remains to be determined because, as I have concluded for the reasons that follow, the Board did not address that issue in the context of Mr. Burke's specific allegations relating to the handling of the Clarke arbitration.

60 As noted previously, the Board recognized that Mr. Burke's complaint was that the union processed his grievance in a "superficial or careless manner". The reference to "superficial ... manner" potentially engaged the notion of "arbitrary" behaviour" within s. 130(1). Words like "superficial" and "perfunctory" appear to have been included within that rubric in other cases. See, Adams, *Canadian Labour Arbitration* (2nd ed.), para 13.340-13.250 (updated, February 2007).

61 The Board did not identify, however, what it believed Mr. Burke's allegations of superficial or careless behaviour to be. There was no discussion of the specific points that had been emphasized by Mr. Burke in his complaint and in his subsequent written submissions in response to the submissions of the union and the university and the report of the Board officer. Nor did the union or the university respond to the specific arguments advanced by Mr. Burke. It was as if all of Mr. Burke's points were being ignored by all other participants - a voice crying in the wilderness, so to speak.

62 Because in coming to its conclusions the Board did not engage in any analysis of the specific allegations which Mr. Burke says demonstrate that the processing of his grievance was improperly handled, it is not possible from the reasons of the Board to determine with any assurance that the points that Mr. Burke was making were in fact appreciated by the Board and were taken into account. It is recognized that in some circumstances involving the decision-making of a tribunal with specialized expertise such as the Labour Relations Board the conclusory assertion by the Board that it considered all the material in coming to its decision could be given a degree of deference. However, in this case, the Board went on and stated:

> There is no flagrant error specifically *alleged by Mr. Burke* or discovered in the course of the investigation.
>
> [Italics added]

63 Inasmuch as "flagrant" behaviour is often regarded as an aspect of "arbitrary" behaviour (see, *Adams*, *supra)*, this raises the question as to whether the Board actually appreciated the points Mr. Burke was making or disregarded what he said on the assumption that it related to the other issues which the Board said it could not consider.

64 The fact is that, on a careful reading of what Mr. Burke submitted to the Board in his complaint, his statements to the Investigating Officer and in his reply, he did make specific allegations of arbitrary behaviour. For example, he alleged:

> 1. Following the Browne award, the Director of Human Resources at the University wrote Chris Henley suggesting that "in order to reach a resolution without incurring the time delay and expense of referring the matter to another arbitrator" she, the representative of the university handling the file (Claude Horlick), Mr. Henley and Mr. Burke meet to discuss whether the terms of the last chance agreement could be worked out. She went on to say that "in the event Mr. Burke is not prepared to meet", the matter should be referred to arbitration. Mr. Henley did not reply until two months later and then simply stated that "the union is in agreement with your suggestion that the matter be put forward to another arbitrator for arbitration". Mr. Burke alleged that Mr. Henley did not discuss the director's letter with him and deprived him of the opportunity of directly participating in discussions that might have led to a resolution of acceptable terms of the last chance agreement. It must be remembered that this might have been the only opportunity for Mr. Burke to participate directly in the process of settling terms, since he was ultimately denied an opportunity to participate at the arbitration hearing that later occurred. Mr. Burke alleges that this was an example of "carelessness" on the part of the union and that it amounted to acting "in an arbitrary manner" and constituted an "arbitrary decision".

> 2. Although the Browne award stipulated that Mr. Burke could go back to work under a last chance agreement with "the usual terms and conditions" and although, Mr. Burke says, Chris Henley stated at the arbitration hearing that he was aware of at least 14 other last chance agreements, no template was submitted to arbitrator Clarke to assist him in determining what "usual terms and conditions" were. It led him to observe in his decision that "drafting of 'usual terms and conditions' is a somewhat onerous task in light of the lack of precedent provided by these parties". The only document he had for comparison was the previous last chance agreement that had been signed by Mr. Burke in 2004. That was a document that had a difficult history and, in Mr. Burke's view, could not be understood with respect to its potential applicability to the fashioning of the current last chance agreement without a full understanding of how the original agreement came to be finalized. Mr. Burke argued that it was important for the arbitrator to understand, not only that certain words ("for any reason") were removed but why they were removed, so he could appreciate Mr. Burke's motivation in seeking their removal. That would underscore his concern about being able to be dismissed "for any reason" even if the words were not there simply because a perfectly legitimate and explainable absence would put him above the level of absence-tolerance that might be inserted in the agreement. Mr. Burke alleged:
>
> > Mr. Henley knew I had issues with similar wording in Sept 8, 2004 LCA ... so Mr. Henley should have made this fact known to arbitrator Clarke and argued to protect my Collective rights from such wording

It must be remembered that arbitrator Browne gave no indication in his award as to what conditions should be included in the new agreement to be fashioned other than that they should be "on usual terms and conditions" and that no "existing grievances" were to be pursued over the agreement's life. In that regard, he made no recommendation that there be an arbitrary cutoff of a specific number of hours of sick leave similar to the 2004 agreement beyond which there would be immediate dismissal. Nor did he indicate whether there should, in Mr. Burke's circumstances, be any exception to the cut-off if Mr. Burke had a legitimate reason such as unexpected short-term illness which put him over the cut-off amount. These were all matters which theoretically were up for discussion and argument before arbitrator Clarke. In that context, Mr. Burke alleged that Chris Henley should have explained the significance of the concern over the words "for any reason" in the fashioning of the 2004 agreement and that by not doing so the union "arbitrarily" decided not to give this "background information" to the arbitrator and further did not advise him "that I had issues with the wording".

65 In addition to his specific use of the word "arbitrary", all of Mr. Burke's other allegations were put forward as aspects of his general complaint that the union acted in a "superficial

and careless" manner. As noted earlier, acting in a superficial or perfunctory manner can be a form of arbitrary behaviour. Such other allegations included:

> 1. Mr. Burke alleged that the last chance agreement proposed by the university would have been inconsistent with the terms of the collective agreement. Inasmuch as the effect of the last chance agreement would have been to confirm his status as an employee, he would still be governed, so Mr. Burke argued, by the collective agreement which gave unlimited access to sick leave for legitimate reasons supported by a medical certificate. Mr. Burke alleged that he asked Mr. Henley to raise this issue at the arbitration (presumably with a view to gaining some modification of the terms of the proposed agreement). He says this was not done.
>
> 2. Mr. Burke alleged that Mr. Henley did not call any witnesses at the Clarke arbitration. Because Mr. Burke was denied separate standing at the arbitration, this meant that he was deprived of any opportunity to explain why the terms of the 2004 agreement were not appropriate as a template for the new last chance agreement. Mr. Burke alleged that Mr. Henley did not know the background of the case because he had not been involved in the Browne arbitration or in the earlier events and (presumably) could not have understood why Mr. Burke felt so strongly that a new last chance agreement using the earlier agreement as a model would not have been appropriate.
>
> 3. Mr. Burke alleged that Mr. Henley took the position that he (Burke) wanted Henley to argue the Browne case again before arbitrator Clarke. Mr. Burke says this is incorrect and that he did not want the Browne case reargued. If indeed Henley thought that Mr. Burke simply wanted him to reargue the Browne case again, it demonstrated a fundamental misunderstanding of the points that Mr. Burke wanted to be placed before arbitrator Clarke relative to the fashioning of the new last chance agreement in accordance with the Browne award.

66 The duty of any tribunal is to respond to, and decide on, the essential arguments presented to it. In *United States v. Lake*, [2008] 1 S.C.R. 761 (S.C.C.), LeBel J. for the Court stated, in relation to whether a decision could be said to be reasonable within a *Dunsmuir* analysis:

> [41] ... The Minister's conclusion will not be rational or defensible if he has failed to carry out the proper analysis ...

67 A decision that is unresponsive to the case presented cannot be said to meet the standard of "justification, transparency and intelligibility" within the *Dunsmuir* test of reasonableness. The essential submissions made should not be ignored. If they are regarded by the tribunal as frivolous or irrelevant to the issues in dispute, the tribunal should say so. If they are not, but rather, are simply unpersuasive, the tribunal should be expected to give at least a rational

reason for why they are not persuasive. Such a requirement is inherent in the *Dunsmuir* focus on "the process of articulating reasons" to see if the result is supported by a chain of reasoning that is reasonable.

68 It might also be added that the absence of any reasoning responding to the essential allegations made by Mr. Burke raises the question as to whether the Board may not have met its duty, as a matter of procedural fairness, to provide written reasons for its decision (See *Labour Relations Act*, RSNL 1990, c. L-1, s. 12(1)). This case was not presented or argued - or dealt with by the applications judge - specifically on the basis of the inadequacy of the Board's reasons as an aspect of procedural fairness. Nevertheless, it would be hard to say that reasons which do not respond to the essential allegations made would be adequate. With respect to the adequacy of reasons, LeBel J. also observed in *Lake*:

> [46] ... The minister's reasons must make it clear that he considered the individual's submissions against extradition and must provide some basis for understanding why those submissions were rejected ...

69 Though each submission need not be considered at length or be given detailed analysis, the decision "must make it clear" that the basic submissions were considered. As Goudge J.A. observed in *Clifford v. Ontario (Attorney General)*, 2009 ONCA 670 (Ont. C.A.) at para 30, reasons must "show that the tribunal grappled with the substance of the matter".

70 While it is not necessary to ground this judgment in an adequacy of reasons analysis, it can nevertheless be said that if reasons must *show* that the tribunal grappled with the substance of the matter, it must follow that, for the purpose of a *Dunsmuir* analysis, the tribunal's reasoning process must also *actually* grapple with the substance of the matter. Where it appears, from an analysis of the reasons given in the context of the record and submissions made, that it did not address the essential submissions, it cannot be said that the decision meets the *Dunsmuir* standard of "justification, transparency and intelligibility".

71 The requirement of responding to the essential arguments presented is especially important where a party is self-represented and may not be able to present his or her case with clarity or to package the submissions within the language normally employed in legal submissions, but who nevertheless has the same expectation as all litigants that the essence of their case will be heard and dealt with fairly. Thus, even though a litigant's case is presented in a confused or disjointed way, the tribunal should nevertheless try to tease out of the morass of information presented the essence of the real points being made and then address them as best as can be done in the circumstances.

72 In this case, the Board's decision does not give any indication that it addressed any of the specific allegations made by Mr. Burke as to why he felt that the union's handling of the grievance leading up to and at the Clarke arbitration was arbitrary. Whether or not the

matters alleged by Mr. Burke would, at the end of the day be sufficient in the eyes of this Court to constitute arbitrary behaviour within the meaning of s. 130(1) is not the issue. That is a matter the Board, with its access to investigative powers, is entrusted by statute with determining. In approaching its responsibility it must address itself to the allegations made.

73 The way in which the Board approached the matter, by simply presenting conclusory statements and in fact relying on actions of the union outside the relevant period as evidence of its non-arbitrary behaviour can give no confidence that it properly discharged its responsibility. It is as if the Board (and indeed, the union and the university in their submissions) were unduly influenced by a perception that Mr. Burke was refusing to accept the inevitable and was simply rehashing old grievances rather than saying something new about the way the Clarke arbitration was handled. He was perceived as a broken record, as it were, without anyone listening with understanding to the sounds that were being made.

74 Where there is no indication that the Board in fact addressed Mr. Burke's allegations in the context of the behaviour of the union in the handling of the Clarke arbitration, one cannot make the assumption that it considered the case properly. A decision that is unresponsive to the case presented must be considered an unreasonable decision.

75 To adapt the words of LeBel, J. in *United States v. Lake*, quoted previously, the Board's conclusion "will not be rational or defensible if [it] has failed to carry out the proper analysis" and the reasons given "must make it clear that [the Board] considered the individuals' submissions... and must provide some basis for understanding why these submissions were rejected". That did not happen in this case.

76 It must not be forgotten, however, that the *Dunsmuir* reasonableness analysis also contemplates a review of the decision, not only on the basis of the reasonableness of the tribunal's "process of articulating reasons" but also on the reasonableness of the result. The question that must also be addressed is whether, even though the decision here fails the chain of reasoning test (there being no reasoning addressing the substance of the specific allegations made), it can in any event be supported on the basis that the *result* is nevertheless reasonable.

77 Although the *Dunsmuir* reasonableness analysis contemplates a two-pronged test, it is to be noted that the majority in that case observed that reasonableness is concerned "mostly" with the decision-making process. Nevertheless, it did assert that it was "also" concerned with whether the decision fell within a range of "possible, acceptable outcomes". The majority also referred with approval, in paragraph 48 of the decision, to an article by David Dyzenhaus where he stated that the notion of deference to administrative tribunal decision-making required "a respectful attention to the reasons offered *or which could be offered* in support of a decision" [my emphasis]. This suggests that even though a reviewing court has concluded that the reasoning process as expressed in a decision is flawed to the point of unreasonableness, a

tribunal's decision may nevertheless be saved and supported by the court identifying another basis for the decision, leading to the conclusion that the result is a reasonable one.

78 In my view, it is unclear in the existing case law, as to how, to what degree and in what circumstances a "reasonableness of result" analysis should be employed in a judicial review case applying the *Dunsmuir* reasonableness standard. I conclude, nevertheless, that, whatever its scope, it is not appropriate to employ such an analysis in every case.

79 In *Dunsmuir*, the majority observed at para 48 that "deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law". Intuitively, the notion of the court supplying reasons to support a tribunal decision that is unsupportable by the reasons expressed seems to work against the notion of deferring to the tribunal as the statutorily- designated decision-maker. The idea of upholding a decision on the basis that the result is reasonable, regardless of the reasoning leading to that result is concerning, at least in some circumstances, because one could have a situation where the tribunal, if it had considered the matter without reference to its flawed reasoning might come to a different result. If a court were nevertheless to uphold the decision on a reasonableness of result analysis, the result of the case would be the substitution of a decision by the court that the tribunal would not necessarily have come to. This might not be a concern in a situation where it was clear that even without the usage of the flawed reasoning the result would necessarily be the same as the tribunal's original decision, but of course that will not always be the case.

80 In *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 (B.C. C.A.), Groberman J.A. observed:

> [54] The idea that the Court should review a decision based on the reasonableness of the result as opposed to the chain of reasoning leading to the result must be applied with considerable caution, in my opinion. A court cannot properly be said to defer to a tribunal when it ignores the tribunal's reasons and fashions its own rationale for the result that the tribunal reached...
>
> . . . . .
>
> [56] ... [A court] should not place undue emphasis on the precise articulation of the decision if the underlying logic is sound. On the other hand, a court does not have *carte blanche* to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result.
>
> [Underlining added]

81 In similar fashion, Hunt J.A. in *Macdonald v. Mineral Springs Hospital* [2008 ABCA 273 (Alta. C.A.)] stated:

> [42] ... It is perhaps the case that ... *ex post facto* reasoning could support the view that the decision was reasonable. Doing so, however, would undermine one of the fundamental reasons why courts must defer to tribunals in cases such as this: because they have expertise ... Accepting the reasonableness of their decisions absent so much as a hint as to how they reached them would also encourage tribunals not to explain themselves. Moreover, it would engage courts in doing the very work that legislatures intended tribunals to do. This outcome would also work against the basic purpose of judicial review, which is 'to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.' *Dunsmuir* at para. 28. [Underlining added]
>
> . . . . .
>
> [44] Nothing can be gleaned here by examining the reasonableness of the outcome, because only two are possible: either [the tribunal] had jurisdiction or it did not. Therefore, in applying the reasonableness standard it is necessary to focus on matters such as justification, transparency and intelligibility. Without the benefit of [the tribunal's] reasoning about how it employed its expertise to interpret its home statute, it is impossible to determine whether its decision was reasonable.

82 In the current case, where the specific submissions of Mr. Burke do not appear to have been addressed by the Board, it would be inappropriate for this Court to examine the matter anew, as it were, to determine whether the result was nevertheless reasonable. To do so would involve the Court making a decision that the Board is entrusted by statute with doing.

83 The record consists of the various submissions of Mr. Burke, verified by affidavit, the replies of the union and the university thereto, and the report of the Board's investigating officer. There was no oral hearing where *viva voce* evidence was taken. Neither the union nor the university dealt with Mr. Burke's specific allegations in their replies. The Board officer's report essentially repeated Mr. Burke's allegations without analyzing them or providing the results of any investigation that might have verified or contradicted them.

84 In those circumstances, it would be inappropriate, if not impossible -and certainly unfair to the parties - for this Court to attempt to determine from the existing record whether the decision of the Board was nevertheless a reasonable one. The record does not permit it. It cannot be said that no outcome other than the one reached by the Board is possible. If the matter were remitted to the Board, with its greater powers of conducting investigations into the allegations that have been made and the ability of the union and the university to address and give their perspectives on those specific allegations - something they have not done to

date - it would be possible that the allegations could be upheld; on the other hand, the Board might still consider that the test for relief under s. 130 of the *Labour Relations Act* had not been met. Either way, the Board would be performing the duty entrusted to it by statute. In these circumstances, such a result is more consistent with showing appropriate deference to the board's decision-making authority than for the Court to attempt to support the decision on the basis of other reasoning identified from the record. For these reasons, no separate analysis of the reasonableness of the result of the Board's decision will be undertaken.

(c) The Decision on Judicial Review

85 In her reasons for judgment, the applications judge did not advert to the specific allegations that Mr. Burke had made in his pleadings before the Board and to the Board investigator. Like the Board, she did not engage in any analysis of whether the Board considered any of those allegations and, instead, simply confirmed the Board's compendious, un-analyzed conclusion. That analysis therefore had to be undertaken by this Court.

86 Furthermore, in referring to the Board's conclusion (with which the judge apparently agreed) that the union had demonstrated a "caring attitude", the judge did not analyze how the union acted in the post-Brown award period.

87 In approaching the matter as she did, she fell into the traps into which the Board had fallen.

Conclusion and Disposition

88 The standard of review by this court of the decision of the applications judge is one of correctness. The judge erred in not concluding that the failure of the Board to consider Mr. Burke's specific allegations in the context of the actions of the union in the period leading up to and during the Clark arbitration was an unreasonable decision.

89 The appeal is allowed. The decision of the Labour Relations Board is set aside. The matter must be remitted to the Board for a proper analysis of the specific allegations made by Mr. Burke, considered in the context of the evidence related to the relevant period.

90 The appellant is entitled to his costs of this appeal and in the court below on a party and party basis against the union, the First Respondent herein.

***C.K. Wells J.A.*:**

I concur.

***L.D. Barry J.A.*:**

91 I concur and add only two further comments.

92 First, I agree with the Board's characterization of Mr. Burke's submissions as "disjointed and vague". Most of his arguments before the Board, the Trial Division and this Court are based upon what he believes the law should be rather than on established legal principles. He believes his lack of standing at the arbitration hearings meant he was "blocked from getting the truth out" and he is determined to do so, "no matter what it takes". His two arguments meriting consideration, that he was deprived by the union of an opportunity to meet with the university to discuss resolution of the dispute and deprived of an opportunity to provide arbitrator Clarke with necessary context about removal of the words "for any reason" from the initial last chance agreement, were obscured by his clearly unsupportable propositions regarding, for example, standing at the arbitrations. This goes far to explain why the Board overlooked submissions which it should have expressly addressed in detail. But despite the difficulty in "teasing out" the essence of Mr. Burke's claim, the Board had an obligation to use its best efforts to understand and address Mr. Burke's arguments that he should have had an opportunity to discuss settlement with the university and that an inadequate presentation by the bargaining agent permitted arbitrator Clarke to arrive at wording for the last chance agreement that was too unclear to protect him from arbitrary termination by his employer.

93 Second, the union submits that this Court should not unduly restrict the exercise of discretion by a bargaining agent and should not examine this microscopically. The union may be correct in this submission. But it is for the Board and not this Court to determine whether the approach of the bargaining agent was superficial or adequate. Accordingly, I agree with the Chief Justice that, because it is not clear that no other outcome is possible, the matter must be remitted to the Board for further consideration. Sadly, it appears that even if Mr. Burke is completely successful on a rehearing before the Board, there is a great risk he will be worse off in economic terms, by his own choice, than if he accepted the university's offer to continue his employment under the last chance agreement as proposed. That possible result has been fully explained to him and he has decided, as is his right, to proceed on a matter of principle.

Appeal allowed; matter remitted to board.

TAB 6

2009 ONCA 670
Ontario Court of Appeal

Clifford v. Ontario (Attorney General)

2009 CarswellOnt 5595, 2009 C.E.B. & P.G.R. 8359 (headnote only), 2009 ONCA 670, [2009] W.D.F.L. 4624, [2009] O.J. No. 3900, 181 A.C.W.S. (3d) 201, 188 L.A.C. (4th) 97, 256 O.A.C. 354, 312 D.L.R. (4th) 70, 76 C.C.P.B. 184, 93 Admin. L.R. (4th) 131, 98 O.R. (3d) 210

Sylvia Clifford (Applicant / Respondent) and The Attorney General of Ontario, The Ontario Municipal Employees Retirement System and Bernadette Campbell (Respondents / Appellants)

S.T. Goudge, Robert Sharpe, Robert P. Armstrong JJ.A.

Heard: April 20, 2009
Judgment: September 23, 2009
Docket: CA C49624

Proceedings: reversing *Clifford v. Ontario (Attorney General)* (2008), 2008 CarswellOnt 3188, 237 O.A.C. 277, 2008 C.E.B. & P.G.R. 8298, 70 C.C.P.B. 100, 90 O.R. (3d) 742, 85 Admin. L.R. (4th) 105 (Ont. Div. Ct.)

Counsel: Terrence J. O'Sullivan, M. Paul Michell for Appellant, OMERS
Sheila Holmes for Appellant, Bernadette Campbell
John Legge for Respondent, Sylvia Clifford

Subject: Corporate and Commercial; Estates and Trusts; Public; Labour
Related Abridgment Classifications
Administrative law
III Requirements of natural justice
III.1 Right to hearing
III.1.b Duty of fairness
Administrative law
IV Standard of review
IV.2 Correctness
Pensions
I Private pension plans
I.2 Payment of pension

I.2.k Survivor and death benefits
I.2.k.iii Common law spouses

Headnote

Pensions --- Payment of pension — Survivor and death benefits — Common law spouses
Deceased, who was retired firefighter, married wife in 1980, couple separated in 1996 and divorced in 2004 — When deceased died intestate in 2005 he was paying spousal support to wife and she was named beneficiary under his municipal pension — After deceased's death, another woman, BC, claimed that she was deceased's common-law spouse at time of his death — In response to competing pension claims, tribunal determined that BC was common-law spouse of deceased and dismissed wife's claim — Wife's application for judicial review was granted on ground that tribunal did not give adequate reasons for its decision — BC appealed — Appeal allowed — Decision in question determined significant legal rights between wife and BC and process used was much like court process — Also, decision was final step in process — Therefore, it would be unfair for persons subject to such decision not to be told why result was reached, and therefore procedural fairness imposed legal obligation on tribunal to give reasons — Question on judicial review in such case is whether tribunal's legal obligation has been complied with and therefore standard of review used by court is that of correctness — Tribunal accepted evidence pointing to common law relationship between deceased and BC and found it sufficient to determine that there was such relationship — Tribunal also accepted evidence of continuing relationship between deceased and BC at time of deceased's death — Therefore, tribunal did give reasons for its findings and it could not be faulted for not referring in reasons to evidence that could have led it to decide differently, since reasons need not refer to every piece of evidence — Also, tribunal did make findings of credibility since it accepted certain evidence and not other evidence — Accordingly, reasons were clearly sufficient to meet tribunal's legal obligation and from functional perspective explain why tribunal gave answers it did — As to substance of decision itself, question was whether decision and reasoning in support of it met standard of reasonableness — There was clearly ample evidence to support tribunal's answers to two live issues before it and it clearly accepted that evidence, so that decision in favour of BC was fully justified.
Administrative law --- Requirements of natural justice — Right to hearing — Duty of fairness
Deceased, who was retired firefighter, married wife in 1980, couple separated in 1996 and divorced in 2004 — When deceased died intestate in 2005 he was paying spousal support to wife and she was named beneficiary under his municipal pension — After deceased's death, another woman, BC, claimed that she was deceased's common-law spouse at time of his death — In response to competing pension claims, tribunal determined that BC was common-law spouse of deceased and dismissed wife's claim — Wife's application for judicial review was granted on ground that tribunal did not give adequate reasons for its decision — BC appealed — Appeal allowed — Decision in question determined significant legal rights between wife and BC and process used was much like court process — Also, decision was final step in process — Therefore, it would be unfair for persons subject to such decision not

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Administrative law --- Standard of review — Correctness

Deceased, who was retired firefighter, married wife in 1980, couple separated in 1996 and divorced in 2004 — When deceased died intestate in 2005 he was paying spousal support to wife and she was named beneficiary under his municipal pension — After deceased's death, another woman, BC, claimed that she was deceased's common-law spouse at time of his death — In response to competing pension claims, tribunal determined that BC was common-law spouse of deceased and dismissed wife's claim — Wife's application for judicial review was granted on ground that tribunal did not give adequate reasons for its decision — BC appealed — Appeal allowed — Decision in question determined significant legal rights between wife and BC and process used was much like court process — Also, decision was final step in process — Therefore, it would be unfair for persons subject to such decision not to be told why result was reached, and therefore procedural fairness imposed legal obligation on tribunal to give reasons — Question on judicial review in such case is whether tribunal's legal obligation has been complied with and therefore standard of review used by court is that of correctness — Tribunal accepted evidence pointing to common law relationship between deceased and BC and found it sufficient to determine that there was such relationship — Tribunal also accepted evidence of continuing relationship between deceased and BC at time of deceased's death — Therefore, tribunal did give reasons for its findings and it could not be faulted for not referring in reasons to evidence that could have led it to decide differently, since reasons need not refer to every piece of evidence — Also, tribunal did make findings of credibility since it accepted certain evidence and not other evidence — Accordingly, reasons were clearly sufficient to meet tribunal's legal obligation and from functional perspective explain why tribunal gave answers it did — As to substance of decision itself, question was whether decision and reasoning in support of it met standard of reasonableness — There was

clearly ample evidence to support tribunal's answers to two live issues before it and it clearly accepted that evidence, so that decision in favour of BC was fully justified.

Table of Authorities

Cases considered by *S.T. Goudge J.A.*:

Baker v. Canada (Minister of Citizenship & Immigration) (1999), 1 Imm. L.R. (3d) 1, [1999] 2 S.C.R. 817, 14 Admin. L.R. (3d) 173, 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22 (S.C.C.) — distinguished

New Brunswick (Board of Management) v. Dunsmuir (2008), 372 N.R. 1, 69 Admin. L.R. (4th) 1, 69 Imm. L.R. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick)* [2008] 1 S.C.R. 190, 844 A.P.R. 1, (sub nom. *Dunsmuir v. New Brunswick)* 2008 C.L.L.C. 220-020, D.T.E. 2008T-223, 329 N.B.R. (2d) 1, (sub nom. *Dunsmuir v. New Brunswick)* 170 L.A.C. (4th) 1, (sub nom. *Dunsmuir v. New Brunswick)* 291 D.L.R. (4th) 577, 2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 64 C.C.E.L. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick)* 95 L.C.R. 65 (S.C.C.) — distinguished

R. v. M. (R.E.) (2008), [2008] 11 W.W.R. 383, 83 B.C.L.R. (4th) 44, [2008] 3 S.C.R. 3, 2008 CarswellBC 2037, 2008 CarswellBC 2038, 2008 SCC 51, 235 C.C.C. (3d) 290, 60 C.R. (6th) 1, 297 D.L.R. (4th) 577, 380 N.R. 47, 439 W.A.C. 40, 260 B.C.A.C. 40 (S.C.C.) — followed

Statutes considered:

Ontario Municipal Employees Retirement System Act, 2006, S.O. 2006, c. 2

Generally — referred to

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally — referred to

APPEAL by respondent from judgment reported at *Clifford v. Ontario (Attorney General)* (2008), 2008 CarswellOnt 3188, 237 O.A.C. 277, 2008 C.E.B. & P.G.R. 8298, 70 C.C.P.B. 100, 90 O.R. (3d) 742, 85 Admin. L.R. (4th) 105 (Ont. Div. Ct.), granting application for judicial review of decision of tribunal.

***S.T. Goudge J.A.*:**

A. Overview

1 Where an administrative tribunal has a legal obligation to give reasons for its decision, on judicial review, what standard of review should the court apply in deciding whether it has done so? And then how does the court assess whether the reasons the tribunal provides are adequate to meet that legal obligation? Those are the principal questions raised by this appeal.

2 In this case, the Divisional Court, by majority, assessed the reasons of the administrative tribunal against both a standard of reasonableness and the principles of natural justice and

procedural fairness. It found the reasons inadequate to meet the tribunal's legal obligation. It therefore granted the application for judicial review and quashed the decision.

3 For the reasons that follow, I would allow the appeal. In my view, the majority of the Divisional Court erred in applying the standard of reasonableness and in finding the reasons inadequate to meet the tribunal's legal obligation. I would apply the standard of correctness and conclude that the reasons given by the tribunal are adequate to meet its legal obligation.

4 The Ontario Municipal Employees Retirement System (OMERS) is a pension benefit system that is primarily for employees of Ontario municipalities. The administrative tribunal under scrutiny here is its Appeal Sub-committee (the Tribunal). Both OMERS and the Tribunal are governed by the *Ontario Municipal Employees Retirement System Act, 2006*, S.O. 2006, c.2 and the *Pension Benefits Act*, R.S.O. 1990, c. P.8. Determinations of entitlement to a pension benefit are made in the first instance by the president of OMERS. Appeals from the president are heard by the Tribunal, a sub-committee of the OMERS Board, whose members typically consist either primarily or exclusively of non lawyers. In this case, the Tribunal was comprised entirely of nonlawyers.

5 The facts giving rise to the dispute in this case are not complicated. Tony Clifford was a Toronto firefighter and a member of OMERS. Sylvia Clifford and Tony Clifford were married in 1980. They had two children. They separated in 1996 and were legally divorced in January 2004. Mr. Clifford died without a will on February 20, 2005. Ms. Clifford is the named beneficiary under his OMERS pension plan.

6 In 1999, Mr. Clifford moved into Bernadette Campbell's residence. Ms. Campbell asserts that they lived together as common law partners until his death. It is undisputed that if this was so, Ms. Campbell, rather than Ms. Clifford, is entitled to the surviving spousal benefit from Mr. Clifford's OMERS pension.

7 After Mr. Clifford's death, Ms. Campbell applied to OMERS for this benefit. Ms. Clifford contested the application, saying that Ms. Campbell and Mr. Clifford were not common law spouses at the time of his death, and claiming the benefit for herself.

8 At first instance, the president of OMERS concluded that Ms. Campbell and Mr. Clifford were living in a common law relationship at the time of his death, and Ms. Campbell was therefore entitled to the surviving spousal benefit under his OMERS plan.

9 Ms. Clifford appealed to the Tribunal. It conducted a hearing *de novo* into the matter. Twelve witnesses were heard over two days of evidence. Argument was received from counsel, and a full transcript of the hearing was produced.

10 The Tribunal reserved its decision for several weeks and issued a decision dismissing Ms. Clifford's appeal. It set out the two questions it had to decide under the OMERS plan and governing legislation: whether Ms. Campbell and Mr. Clifford were in a common law relationship for at least three years prior to his death; and whether this relationship was still in place at the time of his death.

11 On the first question, it noted the uncontested evidence that Mr. Clifford moved into Ms. Campbell's residence in 1999. It then recited evidence supportive of Ms. Campbell's claim that they lived together as common law partners, including evidence of many activities they engaged in together, and evidence of Ms. Campbell's involvement in his funeral arrangements, being named in the notice in the newspaper and receiving a share of his ashes, and finally evidence from neighbours of their own observations of the couple. On this basis, the Tribunal concluded that the necessary common law relationship was established.

12 The Tribunal then considered the second question. Mr. Clifford died in a motel while on a drinking binge. There was evidence that he had battled a serious drinking problem for some time and would, on occasion, move to a motel when on a binge, always returning to take up residence with Ms. Campbell. The Tribunal also referred to evidence from Mr. Clifford's union representative that shortly before his death, Ms. Campbell told the representative that the relationship had essentially ended and Mr. Clifford no longer resided with her. It also referred to Ms. Campbell's denial of this and recited other evidence tending to support her, such as the continued presence of many of his personal belongings and important papers in the home. The Tribunal concluded its decision this way:

> [W]e are not persuaded that the conjugal relationship between Ms. Campbell and Mr. Clifford had terminated at the time of his death, and accordingly we dismiss the appeal of Ms. Clifford.

13 Ms. Clifford applied for judicial review of the Tribunal's decision. Molloy J. for the majority of the Divisional Court concluded that the Tribunal was required to give reasons but had failed to adequately do so.

14 The majority found that the Tribunal may have improperly reversed the onus of proof when it stated it was not persuaded that the conjugal relationship between Mr. Clifford and Ms. Campbell had terminated at the time of his death, but in the absence of any reasons beyond this single sentence, it was impossible to say. The majority also found that, despite hearing conflicting evidence on many points, the Tribunal made no findings of credibility or reliability and offered no reasons as to how its ultimate decision was reached. Finally, the majority listed a number of pieces of evidence that it felt would have been relevant for the Tribunal to consider in deciding if a common law relationship existed and whether it had ended, but which the Tribunal did not refer to in its reasons.

15 In addressing the appropriate standard of review the majority noted that the Supreme Court of Canada had fundamentally changed the law in *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190 (S.C.C.). Molloy J. concluded at para. 31 of her reasons:

> In *Dunsmuir*, the Supreme Court of Canada noted that "reasonableness" is not merely a function of outcome, but also refers to "the process of articulating the reasons". The Court also held that the concept of reasonableness requires "justification, transparency and intelligibility within the decision-making process". In the absence of reasons setting out what the Tribunal's decision-making process was, the Tribunal's decision cannot be said to be "justified" or "transparent" or "intelligible". It is incumbent on the Tribunal, particularly in a case of this nature, to articulate its reasons so that the parties will know the basis upon which the case was decided and the reviewing court can determine whether the decision is a "reasonable" one. The reasons in this case do not enable that process to be carried out. Accordingly, the decision is not a "reasonable one" and is also not in accordance with principles of natural justice and procedural fairness.

16 Having found the reasons wanting, Molloy J. allowed the application and quashed the Tribunal's decision.

B. Analysis

First Issue: The legal obligation to give reasons

17 It is surely desirable that public decision makers empowered by law to make decisions affecting the rights, privileges or interests of individuals should, so far as possible, explain their decisions. This helps build public confidence in those decisions and is an important mechanism by which the decision makers can be held accountable. However, that reality does not impose on all public decision makers a legal obligation to give reasons for every decision. That is a much more nuanced issue.

18 In this case, however, all parties conceded that the Tribunal had such a legal obligation. I agree.

19 In *Dunsmuir* at para. 79, the Supreme Court of Canada repeated that procedural fairness is a cornerstone of modern Canadian administrative law that requires public decision makers to act fairly in coming to decisions that affect the rights, privileges or interests of an individual and that what this requires is to be decided in the specific context of each case. A decade earlier, *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) established that *in certain circumstances* the duty of procedural fairness will include a requirement that an administrative tribunal provide reasons for its decision.

20 All of the circumstances in a particular case must be considered in order to determine the content of the duty of procedural fairness, including whether it includes the obligation to give reasons. While acknowledging there may be other factors, *Baker* suggests five factors of relevance to determine the content of the duty of fairness: the nature of the decision being made and the process followed in making it; the nature of the statutory scheme being administered; the importance of the decision to the affected individual; the legitimate expectations of the person challenging the decision; and respect for the choice of procedures made by the administrative agency itself.

21 In this case, several of these considerations make it particularly important that the Tribunal give reasons as part of its duty of procedural fairness. The decision determines significant legal rights as between Ms. Campbell and Ms. Clifford, and the process used involved hearing evidence and argument by counsel, much like a court process. This points to greater procedural protections closer to those provided by courts. The fact that the decision is the final step in the process also supports the need for greater procedural protections. The importance of determining entitlement to surviving spousal benefits to Ms. Campbell and Ms. Clifford is clear. In summary, to paraphrase *Baker* at para. 43, it would be unfair for persons subject to a decision such as this one not to be told why the result was reached. In these circumstances, it is clear that procedural fairness imposes a legal obligation on the Tribunal to give reasons for its decision.

The Second Issue: The standard of review of the legal obligation to give reasons

22 Where an administrative tribunal has a legal obligation to give reasons for its decision as part of its duty of procedural fairness, the question on judicial review is whether that legal obligation has been complied with. The court cannot give deference to the choice of a tribunal whether to give reasons. The court must ensure that the tribunal complies with its legal obligation. It must review what the tribunal has done and decide if it has complied. In the parlance of judicial review, the standard of review used by the court is correctness.

23 In my view, this remains unchanged by *Dunsmuir*. In his concurring reasons in that case, Binnie J. makes clear that the courts cannot defer to the administrative decision maker's choice of process where that decision maker is legally obliged to provide procedural fairness. He says this at para. 129:

> [A] fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process.

[Emphasis added.]

24 With respect, I disagree with the suggestion that *Dunsmuir* now requires the reviewing court apply the standard of reasonableness to assess whether the administrative tribunal has complied with its duty of procedural fairness. There is no doubt that the reconsideration of the standards of judicial review in *Dunsmuir* and its conclusion that there should be only two standards (correctness and reasonableness) is an important jurisprudential development, most particularly where the application for judicial review challenges the substantive outcome of an administrative action. In such a context, the discussion in *Dunsmuir* of the choice of standard of review is vital in assessing that outcome. However, where, as here, the question is whether the administrative tribunal has complied with its duty of procedural fairness, the court must decide the question. As Binnie J. said, the court must have the final say.

Third Issue: Assessing compliance with the legal obligation to give reasons

25 Where an applicant for judicial review argues that an administrative tribunal with a legal obligation to give reasons for its decision has failed to do so, how is the court to determine if this obligation has been complied with?

26 In the rare case where nothing is offered by the tribunal to support its decision, the question is readily answered in the negative. Where something is offered, the task is to determine whether, in the context of the particular case, this constitutes reasons sufficient to meet the tribunal's legal obligation.

27 In *Baker*, where the Supreme Court of Canada first explained that in certain circumstances the duty of procedural fairness requires reasons to be given, it also cautioned that, although it has the final say, the reviewing court must use flexibility in determining what constitutes reasons sufficient to meet this obligation. As *Baker* stated at para. 44, this approach recognizes the varied day-to-day realities of administrative agencies and the many ways that procedural fairness can be achieved.

28 Important guidance is also provided by *R. v. M. (R.E.)*, [2008] 3 S.C.R. 3 (S.C.C.), particularly paras. 15 to 35. Although a criminal case, the Supreme Court of Canada addresses the precise question of what in the context of a particular case constitutes reasons sufficient to meet the legal obligation to provide a written explanation for a decision. This is directly relevant to the case at bar.

29 *M. (R.E.)* emphasizes that where reasons are legally required, their sufficiency must be assessed functionally. In the context of administrative law, reasons must be sufficient to fulfill the purposes required of them, particularly to let the individual whose rights, privileges

or interests are affected know why the decision was made and to permit effective judicial review. As *M. (R.E.)* held at para. 17, this is accomplished if the reasons, read in context, show why the tribunal decided as it did. The basis of the decision must be explained and this explanation must be logically linked to the decision made. This does not require that the tribunal refer to every piece of evidence or set out every finding or conclusion in the process of arriving at the decision. To paraphrase for the administrative law context what the court says in *M. (R.E.)* at para. 24, the "path" taken by the tribunal to reach its decision must be clear from the reasons read in the context of the proceeding, but it is not necessary that the tribunal describe every landmark along the way.

30 *M. (R.E.)* also emphasizes that the assessment of whether reasons are sufficient to meet the legal obligation must pay careful attention to the circumstances of the particular case. That is, read in the context of the record and the live issues in the proceeding, the fundamental question is whether the reasons show that the tribunal grappled with the substance of the matter: see *M. (R.E.)* at para. 43.

31 In addition, in my view, it is important to differentiate the task of assessing the adequacy of reasons given by an administrative tribunal from the task of assessing the substantive decision made. A challenge on judicial review to the sufficiency of reasons is a challenge to an aspect of the procedure used by the tribunal. The court must assess the reasons from a *functional* perspective to see if the basis for the decision is intelligible.

32 This is to be distinguished from a challenge on judicial review to the outcome reached by the tribunal. That may require the court to examine not only the decision but the reasoning offered in support of it from a *substantive* perspective. Depending on the applicable standard of review, the court must determine whether the outcome and the reasoning supporting it are reasonable or correct. That is a very different task from assessing the sufficiency of the reasons in a functional sense.

Fourth Issue: The sufficiency of the reasons in this case

33 The Tribunal here was under a legal obligation to given reasons for its decision. It purported to do so. The question is whether those reasons are adequate to meet its legal obligation.

34 It is uncontested that the Tribunal was presented with two live issues to decide: whether Ms. Campbell and Mr. Clifford had been in a common law relationship for at least three years prior to his death; and whether this relationship was still in place at the time of his death. The Tribunal identified both questions, grappled with them one after the other and provided its answers to both.

35 In explaining its answer to the first issue, the Tribunal recited evidence of the activities of Ms. Campbell and Mr. Clifford after 1999, and of Ms. Campbell after his death, that pointed to a common law relationship for more than three years prior to Mr. Clifford's death. It also recited evidence to the same effect from their neighbours about the nature of their relationship. The Tribunal clearly accepted this evidence and found it a sufficient basis upon which to conclude that Ms. Campbell and Mr. Clifford had been in a common law relationship for the necessary length of time before he died.

36 The Tribunal addressed the second issue by first reciting Mr. Clifford's past pattern, absenting himself from Ms. Campbell's house while on a drinking binge but always returning. It then turned to whether anything was different about the drinking binge during which he died in February 2005. It referred to evidence that on that occasion Ms. Campbell said to Mr. Clifford's union representative that the relationship had ended and her denial of this. It recited other evidence that tended to show that the relationship had indeed not terminated. It concluded by answering this question in Ms. Campbell's favour. It is clear that the Tribunal accepted this evidence of a continuing relationship at the time of Mr. Clifford's death and based its conclusion on that.

37 The majority of the Divisional Court offered a number of reasons for finding that the tribunal breached its legal obligation to provide reasons for its decision.

38 First, it said that no reasons were provided as to how that decision was reached. With respect I disagree. The Tribunal gave reasons, as I have described.

39 Second, the majority expressed concern that the Tribunal might have made significant errors on matters not addressed in its reasons. For example, it might have misapprehended evidence that it did not refer to. In my view, that is the wrong focus. The task is to determine whether what was said is sufficient, not what problems might have been with what was not said.

40 Third, the majority faulted the Tribunal for not referring to evidence that could have led it to decide differently. Again, I disagree. As I have described, reasons need not refer to every piece of evidence to be sufficient, but must simply provide an adequate explanation of the basis upon which the decision was reached.

41 Fourth, the Tribunal is criticized for making no findings of credibility or reliability. In my view, this is to misread the Tribunal's reasons. It set out the evidence in support of the conclusions reached on both issues. Clearly, the Tribunal found that evidence to be credible and reliable. This was open to the Tribunal to do.

42 Finally, the majority said that the Tribunal might have improperly reversed the onus of proof by concluding that it was not persuaded that the common law relationship had terminated at the time of Mr. Clifford's death and that this uncertainty rendered the reasons insufficient.

43 I do not agree. As *Baker* indicated, recognition of the day-to-day realities of administrative agencies is important in the task of assessing sufficiency of reasons in the administrative law context. One of those realities is that many decisions by such agencies are made by nonlawyers. That includes this one. If the language used falls short of legal perfection in speaking to a straightforward issue that the tribunal can be assumed to be familiar with, this will not render the reasons insufficient provided there is still an intelligible basis for the decision.

44 In my view, these reasons are clearly sufficient to meet the Tribunal's legal obligation. Read in the context of the particular case, they demonstrate that the Tribunal grappled with the two live issues before it. From a functional perspective, they explain why the Tribunal gave the answers it did to those issues. Neither Ms. Clifford nor Ms. Campbell can be left in any doubt about that. Moreover, they allow for effective judicial review of the decision itself. The Tribunal did what was required of it to meet its legal obligation to provide reasons for its decision.

45 As to the decision itself, all parties took the position before the Divisional Court that on judicial review such a challenge would require deference from the reviewing court. The question is whether the decision was reasonable. Here both the decision itself and the reasoning in support of it meet the standard of reasonableness. There was clearly ample evidence to support the Tribunal's answers to the two live issues before it. The Tribunal clearly accepted that evidence. It is not up to the court to second guess the Tribunal's findings. Having made these findings, the Tribunal's decision in favour of Ms. Campbell is fully justified. The decision meets the standard of reasonableness.

46 For these reasons, I would allow the appeal and dismiss the application for judicial review. The appellant does not seek costs here or below. Ms. Campbell played a minor role supporting the appellant in both courts and is entitled only to a modest costs order payable by Ms. Clifford which I would fix at $1,000 in each court.

***Robert Sharpe J.A.*:**

I agree.

***Robert P. Armstrong J.A.*:**

I agree.

Appeal allowed.

End of Document

TAB 7

ONTARIO ENERGY BOARD

Rules of Practice and Procedure
(Revised November 16, 2006, July 14, 2008, October 13, 2011, January 9, 2012, January 17, 2013, April 24, 2014 and October 28, 2016)

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PART VI - COSTS

PART VII - REVIEW

37.03 Where all or part of a hearing is to be conducted in French, the notice of the hearing shall specify in English and French that the hearing is to be so conducted, and shall further specify that English may also be used.

37.04 Where a written submission or written evidence is provided in either English or French, the Board may order any person presenting such written submission or written evidence to provide it in the other language if the Board considers it necessary for the fair disposition of the matter.

38. Media Coverage

38.01 Radio and television recording of an oral or electronic hearing which is open to the public may be permitted on conditions the Board considers appropriate, and as directed by the Board.

38.02 The Board may refuse to permit the recording of all or any part of an oral or electronic hearing if, in the opinion of the Board, such coverage would inhibit specific witnesses or disrupt the proceeding in any way.

PART VI - COSTS

39. Cost Eligibility and Awards

39.01 Any person may apply to the Board for eligibility to receive cost awards in Board proceedings in accordance with the *Practice Directions*.

39.02 Any person in a proceeding whom the Board has determined to be eligible for cost awards under **Rule 39.01** may apply for costs in the proceeding in accordance with the *Practice Directions*.

PART VII - REVIEW

40. Request

40.01 Subject to **Rule 40.02**, any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.

40.02 A person who was not a party to the proceeding must first obtain the leave of the Board by way of a motion before it may bring a motion under **Rule 40.01**.

40.03 The notice of motion for a motion under **Rule 40.01** shall include the information required under **Rule 42**, and shall be filed and served within 20 calendar days of the date of the order or decision.

40.04 Subject to **Rule 40.05**, a motion brought under **Rule 40.01** may also include a request to stay the order or decision pending the determination of the motion.

40.05 For greater certainty, a request to stay shall not be made where a stay is precluded by statute.

40.06 In respect of a request to stay made in accordance with **Rule 40.04**, the Board may order that the implementation of the order or decision be delayed, on conditions as it considers appropriate.

41. Board Powers

41.01 The Board may at any time indicate its intention to review all or part of any order or decision and may confirm, vary, suspend or cancel the order or decision by serving a letter on all parties to the proceeding.

41.02 The Board may at any time, without notice or a hearing of any kind, correct a typographical error, error of calculation or similar error made in its orders or decisions.

42. Motion to Review

42.01 Every notice of a motion made under **Rule 40.01**, in addition to the requirements under **Rule 8.02**, shall:

(a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen;

(iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and

(b) if required, and subject to **Rule 40**, request a stay of the implementation of the order or decision or any part pending the determination of the motion.

43. Determinations

43.01 In respect of a motion brought under **Rule 40.01**, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

TAB 8

Français

Ontario Energy Board Act, 1998

S.O. 1998, CHAPTER 15
Schedule B

Consolidation Period: From January 1, 2018 to the e-Laws currency date.

Last amendment: 2017, c. 34, Sched. 46, s. 33.

Legislative History: 1999, c. 6, s. 48; 2000, c. 26, Sched. D, s. 2; 2001, c. 9, Sched. F, s. 2; 2002, c. 1, Sched. B (But see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - December 31, 2012); 2002, c. 17, Sched. F, Table; 2002, c. 23, s. 4; 2003, c. 3, s. 2-90; 2003, c. 8; 2004, c. 8, s. 46, Table; 2004, c. 17, s. 32; 2004, c. 23, Sched. B (But see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - December 31, 2014); 2005, c. 5, s. 51; 2006, c. 3, Sched. C; 2006, c. 21, Sched. F, s. 136 (1); 2006, c. 32, Sched. C, s. 42; 2006, c. 33, Sched. X; 2006, c. 35, Sched. C, s. 98; 2007, c. 8, s. 222; 2009, c. 12, Sched. D; 2009, c. 33, Sched. 2, s. 51; 2009, c. 33, Sched. 6, s. 77; 2009, c. 33, Sched. 18, s. 21; 2010, c. 8, s. 38; 2010, c. 26, Sched. 13, s. 17; 2011, c. 1, Sched. 4; 2011, c. 9, Sched. 27, s. 34; See: Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - December 31, 2011; 2014, c. 7, Sched. 23; 2015, c. 20, Sched. 31; 2015, c. 29, s. 7-20; CTS 16 MR 10 - 3; 2016, c. 10, Sched. 2, s. 11-16; 2016, c. 19, s. 17; 2016, c. 23, s. 61; 2017, c. 1; 2017, c. 2, Sched. 10, s. 2; 2017, c. 16, Sched. 1, s. 44; 2017, c. 16, Sched. 2; 2017, c. 20, Sched. 8, s. 109; 2017, c. 25, Sched. 9, s. 106; 2017, c. 34, Sched. 18, s. 3; 2017, c. 34, Sched. 31; 2017, c. 34, Sched. 46, s. 33.

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PART IX
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PART I
GENERAL

Board objectives, electricity

1 (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.

1.1 To promote the education of consumers.

2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.

4. To facilitate the implementation of a smart grid in Ontario.

5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission

16 REPEALED: 2003, c. 3, s. 19.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 19 - 01/08/2003

17 REPEALED: 2003, c. 3, s. 19.

Section Amendments with date in force (d/m/y)

2000, c. 26, Sched. D, s. 2 (1) - 06/12/2000

2002, c. 1, Sched. B, s. 2 (1, 2) - 01/07/2002

2003, c. 3, s. 19 - 01/08/2003

Transfer of authority or licence

18 (1) No authority given by the Board under this or any other Act shall be transferred or assigned without leave of the Board. 1998, c. 15, Sched. B, s. 18 (1).

Same

(2) A licence issued under this Act is not transferable or assignable without leave of the Board. 1998, c. 15, Sched. B, s. 18 (2).

Board's powers, general

Power to determine law and fact

19 (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact. 1998, c. 15, Sched. B, s. 19 (1).

Order

(2) The Board shall make any determination in a proceeding by order. 1998, c. 15, Sched. B, s. 19 (2); 2001, c. 9, Sched. F, s. 2 (1).

Reference

(3) If a proceeding before the Board is commenced by a reference to the Board by the Minister of Natural Resources, the Board shall proceed in accordance with the reference. 1998, c. 15, Sched. B, s. 19 (3).

Additional powers and duties

(4) The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise shall, determine any matter that under this Act or the regulations it may upon an application determine and in so doing the Board has and may exercise the same powers as upon an application. 1998, c. 15, Sched. B, s. 19 (4).

Exception

(5) Unless specifically provided otherwise, subsection (4) does not apply to any application under the *Electricity Act, 1998* or any other Act. 1998, c. 15, Sched. B, s. 19 (5).

Jurisdiction exclusive

(6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act. 1998, c. 15, Sched. B, s. 19 (6).

Section Amendments with date in force (d/m/y)

2001, c. 9, Sched. F, s. 2 (1) - 08/08/2001

Powers, procedures applicable to all matters

20 Subject to any provision to the contrary in this or any other Act, the powers and procedures of the Board set out in this Part apply to all matters before the Board under this or any other Act. 1998, c. 15, Sched. B, s. 20.

Board's powers, miscellaneous

21 (1) The Board may at any time on its own motion and without a hearing give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act. 1998, c. 15, Sched. B, s. 21 (1).

Hearing upon notice

(2) Subject to any provision to the contrary in this or any other Act, the Board shall not make an order under this or any other Act until it has held a hearing after giving notice in such manner and to such persons as the Board may direct. 1998, c. 15, Sched. B, s. 21 (2).

(3) REPEALED: 2000, c. 26, Sched. D, s. 2 (2).

No hearing

(4) Despite section 4.1 of the *Statutory Powers Procedure Act*, the Board may, in addition to its power under that section, dispose of a proceeding without a hearing if,

(a) no person requests a hearing within a reasonable time set by the Board after the Board gives notice of the right to request a hearing; or

(b) the Board determines that no person, other than the applicant, appellant or licence holder will be adversely affected in a material way by the outcome of the proceeding and the applicant, appellant or licence holder has consented to disposing of a proceeding without a hearing.

(c) REPEALED: 2003, c. 3, s. 20 (1).

1998, c. 15, Sched. B, s. 21 (4); 2002, c. 1, Sched. B, s. 3; 2003, c. 3, s. 20 (1).

Consolidation of proceedings

(5) Despite subsection 9.1 (1) of the *Statutory Powers Procedure Act*, the Board may combine two or more proceedings or any part of them, or hear two or more proceedings at the same time, without the consent of the parties. 2003, c. 3, s. 20 (2).

Non-application

(6) Subsection 9.1 (3) of the *Statutory Powers Procedure Act* does not apply to proceedings before the Board. 1998, c. 15, Sched. B, s. 21 (6).

Use of same evidence

(6.1) Despite subsection 9.1 (5) of the *Statutory Powers Procedure Act*, the Board may treat evidence that is admitted in a proceeding as if it were also admitted in another proceeding that is heard at the same time, without the consent of the parties to the second-named proceeding. 2003, c. 3, s. 20 (3).

Interim orders

(7) The Board may make interim orders pending the final disposition of a matter before it. 1998, c. 15, Sched. B, s. 21 (7).

Section Amendments with date in force (d/m/y)

2000, c. 26, Sched. D, s. 2 (2) - 06/12/2000

2002, c. 1, Sched. B, s. 3 - 27/06/2002

2003, c. 3, s. 20 (1-3) - 01/08/2003

Liquidators, etc.

21.1 (1) None of the following prevent the exercise by the Board of any jurisdiction conferred by this or any other Act with respect to a regulated utility:

1. The fact that a liquidator, receiver, manager or other official of the regulated utility has been appointed by a court in Ontario.

2. The fact that a writ of sequestration has been issued in Ontario with respect to the regulated utility.

3. The fact that a person is managing or operating the regulated utility under the authority of a court in Ontario. 2017, c. 2, Sched. 10, s. 2 (2).

Obligations of liquidators, etc.

(2) A regulated utility interim official shall manage and operate the regulated utility in accordance with,

(a) this Act;

Stated case

32 (1) The Board may, at the request of the Lieutenant Governor in Council or of its own motion or upon the motion of any party to proceedings before the Board and upon such security being given as it directs, state a case in writing for the opinion of the Divisional Court upon any question that is a question of law within the jurisdiction of the Board. 1998, c. 15, Sched. B, s. 32 (1); 2003, c. 3, s. 27.

Same

(2) The Divisional Court shall hear and determine the stated case and remit it to the Board with its opinion. 1998, c. 15, Sched. B, s. 32 (2).

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 27 - 01/08/2003

Appeal to Divisional Court

33 (1) An appeal lies to the Divisional Court from,

(a) an order of the Board;

(b) the making of a rule under section 44; or

(c) the issuance of a code under section 70.1. 2003, c. 3, s. 28 (1).

Nature of appeal, timing

(2) An appeal may be made only upon a question of law or jurisdiction and must be commenced not later than 30 days after the making of the order or rule or the issuance of the code. 1998, c. 15, Sched. B, s. 33 (2); 2003, c. 3, s. 28 (2).

Board may be heard

(3) The Board is entitled to be heard by counsel upon the argument of an appeal. 1998, c. 15, Sched. B, s. 33 (3).

Board to act on court's opinion

(4) The Divisional Court shall certify its opinion to the Board and the Board shall make an order in accordance with the opinion, but the order shall not be retroactive in its effect. 1998, c. 15, Sched. B, s. 33 (4).

Board not liable for costs

(5) The Board, or any member of the Board, is not liable for costs in connection with any appeal under this section. 1998, c. 15, Sched. B, s. 33 (5).

Order to take effect despite appeal

(6) Subject to subsection (7), every order made by the Board takes effect at the time prescribed in the order, and its operation is not stayed by an appeal, unless the Board orders otherwise. 2006, c. 33, Sched. X, s. 1.

Court may stay the order

(7) The Divisional Court may, on an appeal of an order made by the Board,

(a) stay the operation of the order; or

(b) set aside a stay of the operation of the order that was ordered by the Board under subsection (6). 2006, c. 33, Sched. X, s. 1.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 28 (1, 2) - 01/08/2003

2006, c. 33, Sched. X, s. 1 - 22/02/2007

No petition to Lieutenant Governor in Council

Definition

34 (1) In this section,

"old section 34" means this section as it read immediately before the day the *Good Government Act, 2009* received Royal Assent. 2009, c. 33, Sched. 2, s. 51 (2).

2003, c. 3, s. 50 - 01/08/2003

Suspension or revocation, Board consideration

77 (1)-(4) REPEALED: 2003, c. 3, s. 51 (1).

Cancellation of licence

(5) The Board may cancel a licence upon the request in writing of the licence holder. 1998, c. 15, Sched. B, s. 77 (5); 2003, c. 3, s. 51 (2).

(6) REPEALED: 2000, c. 26, Sched. D, s. 2 (6).

Section Amendments with date in force (d/m/y)

2000, c. 26, Sched. D, s. 2 (6) - 06/12/2000

2003, c. 3, s. 51 (1, 2) - 01/08/2003

Orders by Board, electricity rates

Order re: transmission of electricity

78 (1) No transmitter shall charge for the transmission of electricity except in accordance with an order of the Board, which is not bound by the terms of any contract. 2000, c. 26, Sched. D, s. 2 (7).

Order re: distribution of electricity

(2) No distributor shall charge for the distribution of electricity or for meeting its obligations under section 29 of the *Electricity Act, 1998* except in accordance with an order of the Board, which is not bound by the terms of any contract. 2000, c. 26, Sched. D, s. 2 (7).

Order re the Smart Metering Entity

(2.1) The Smart Metering Entity shall not charge for meeting its obligations under Part IV.2 of the *Electricity Act, 1998* except in accordance with an order of the Board, which is not bound by the terms of any contract. 2006, c. 3, Sched. C, s. 5 (1).

Note: On a day to be named by proclamation of the Lieutenant Governor, section 78 is amended by adding the following subsection:

Order re unit smart meter provider

(2.2) No unit smart meter provider shall charge for unit smart metering except in accordance with an order of the Board, which is not bound by the terms of any contract. 2010, c. 8, s. 38 (12).

See: 2010, c. 8, ss. 38 (12), 40.

Note: On April 1, 2018, the day named by proclamation of the Lieutenant Governor, section 78 is amended by adding the following subsection:

Order re unit sub-meter provider

(2.3) No unit sub-meter provider shall charge for unit sub-metering except in accordance with an order of the Board, which is not bound by the terms of any contract. 2010, c. 8, s. 38 (13).

See: 2010, c. 8, ss. 38 (13), 40.

Rates

(3) The Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity or such other activity as may be prescribed and for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*. 2009, c. 12, Sched. D, s. 12 (1).

Note: On April 1, 2018, the day named by proclamation of the Lieutenant Governor, subsection (3) is amended by striking out "electricity or such other activity" and substituting "electricity, unit sub-metering or unit smart metering or such other activity". See: 2010, c. 8, ss. 38 (14), 40.

Note: On a day to be named by proclamation of the Lieutenant Governor, section 78 is amended by adding the following subsection:

Rates, unit sub-metering and unit smart-metering

(3.0.0.1) The Board shall, in accordance with rules prescribed by the regulations, make orders approving or fixing separate rates for unit sub-metering and for unit smart metering,

(a) for classes of consumers, as may be prescribed by regulation; and

TAB 9

Ontario Energy Board
Commission de l'énergie de l'Ontario

Ontario Energy Board

Filing Requirements For
Electricity Transmission Applications

Chapter 2

Revenue Requirement Applications

February 11, 2016

J. Deferral and Variance Accounts

- Accounts requested for disposition
- Total disposition and disposition period
- New deferral and variance accounts requested

K. Bill Impacts

- Summary of total bill impacts ($ and %) at the wholesale level (ie, change in the three uniform transmission rates, including an illustration of the impact on a typical customer connected directly to the transmission system that is not a distributor) and for typical retail customers (Residential at 800 kWh per month and General Service <50 kWh at 2000 kWh per month)

2.3.2 Customer Engagement

The RRFE contemplates an active role by distributors in customer engagement. The OEB expects that transmitters will initiate or continue customer engagement activities and provide a summary of those activities as part of the application.

The Transmission System Code (TSC) defines customer as a generator, consumer, distributor or unlicensed transmitter whose facilities are connected to or are intended to be connected to the transmission system. The TSC requires some communications and discussions with customers related to matters such as regional planning, connection procedures, testing and inspections, system performance and outages. The applicant's report should describe these and any other activities designed to engage all customers connected to the transmission system, including discussions related to investment planning and transmission rates and charges.

Transmitters should specifically discuss how their customers were engaged in order to determine their needs, what their needs are, and how the application has responded to any identified needs. Applicants must separately report on the needs of end-use load customers (as distinct from regulated distributors) served directly from the transmission system, and explain how the transmitter's application responds to the needs of these customers. Similarly, any discussion of the needs of generator customers should be presented separately.

A report of customer satisfaction surveys undertaken and results of these surveys should be provided. Information on planned future customer engagement activities should also be detailed in this section. Transmitters may find Appendix 2AC in the Distribution Filing Requirements helpful in structuring this evidence.

Transmitters are expected to file with the OEB their response to the matters raised in any letters of comment sent to the OEB related to the transmitter's application.

2.3.3 Financial Information

This section must include the following:

- Non-consolidated audited financial statements of the utility (excluding operations of affiliated companies that are not rate regulated) for which the application has been made, for the most recent three historical years (i.e. two years' statements must be filed).
  - Where the regulated entity conducts more than one activity regulated by the OEB, the transmitter shall disclose information separately about each of its operating segments in accordance with the Segment Disclosure provisions which corporate entities are encouraged to adopt by the Canadian Institute of Chartered Accountants Handbook.
  - If the most recent final audited financial statements are not available at the time of filing the application, the draft financial statements must be filed and the final audited financial statements must be provided as soon as they are available.
- Detailed reconciliation of the financial results shown in the Annual Reports/ Audited Financial Statements with the regulatory financial results filed in the application. The reconciliation must include:
  - The separation of non-utility businesses, for example the fixed assets
  - The identification of any deviations that are being proposed between the Annual Reports/Audited Financial Statements and the regulatory financial statements including the identification of any prior OEB approvals for such deviations that may exist
- Annual Report and management's discussion and analysis for the most recent year of the parent company, if applicable
- Rating agency report(s), if available
- Prospectuses, information circulars, etc. for recent and planned public debt or equity offerings

2.3.4 Administration

This section must include the following:

- Table of Contents
- Statement as to who will be affected by the application, including identification of

measures to be reported annually that are applicable to their individual business. The OEB will expect transmitters to report on performance metrics, such as cost control and project completion, if a multi-year term is approved.

2.6.2 Reliability Performance

All applicants, whether proposing a single or multi-year term, must document in their applications achieved reliability performance, using measures developed by the Canadian Electricity Association including, transmission frequency of delivery point interruptions and transmission duration of delivery point interruptions, unsupplied energy in minutes and transmission system unavailability (percentage of system unavailable). The applicant must also document how it has addressed the performance standards for transmitters as set out in Chapter 4 of the TSC.

The applicant should compare the results for its system performance to those of other systems both nationally and internationally, where available.

2.6.3 Compliance Matters

While most compliance matters are normally resolved outside of the revenue requirement application process, transmitters must discuss any outstanding areas of non-compliance which have had an effect on the application, including any relief sought through this application to resolve the non-compliance.

2.7 Exhibit 5 - Operating Revenue

This exhibit includes evidence on the applicant's forecast of customers, energy and load, service revenue and other revenue, and variance analyses related to these items.

The applicant must provide its customer, volume and revenue forecast, weather normalization methodology, and other sources of revenue in this exhibit. The applicant must include a detailed description of the methodologies and the assumptions used. Estimates must be presented excluding commodity revenues.

The information presented must include:

1) Load and revenue forecasts

TAB 10

ONTARIO ENERGY BOARD

STRATEGIC BLUEPRINT:

Keeping Pace With an Evolving Energy Sector

2017-2022

Ontario

Contents

Message From the Chair

This Strategic Blueprint sets out our commitment to modernize the OEB's approach to regulation in order to keep pace with an evolving energy sector. We announced our undertaking to develop this Blueprint in our 2017-2020 Business Plan that was approved by the Minister of Energy earlier this year.

The Blueprint reflects the OEB's recognition of the significant changes underway in the energy sector, not only in Ontario but around the globe. These changes are being driven by rapid technological innovation, the emergence of new business models, heightened customer expectations about service and affordability, and new public policy initiatives, particularly regarding carbon emissions and climate change.

The Blueprint includes a fresh statement of our Vision, Mission and Values and of the Goals and Objectives that will guide our work over the next five years. We have set a strategic direction that is centred on the OEB's role in supporting and guiding the continuing evolution of the Ontario energy sector in a way that delivers value for all Ontario energy consumers.

We have chosen to call our new strategic direction a Blueprint because the term denotes the expectation that it will be used to build new regulatory frameworks that are both robust enough and flexible enough to adapt to changing circumstances.

I wish to acknowledge the role that Board Members and the OEB's leadership team have played in the development of the new Strategic Blueprint. Their readiness to bring a fresh perspective to the work of the OEB has been key to the completion of the Blueprint. I also want to thank the members of the Chair's Advisory Roundtable for their constructive comments on a preliminary draft.

My colleagues and I look forward to continuing the engagement and collaboration that has been so important in the completion of this Blueprint.

Rosemarie T. Leclair
Chair and CEO

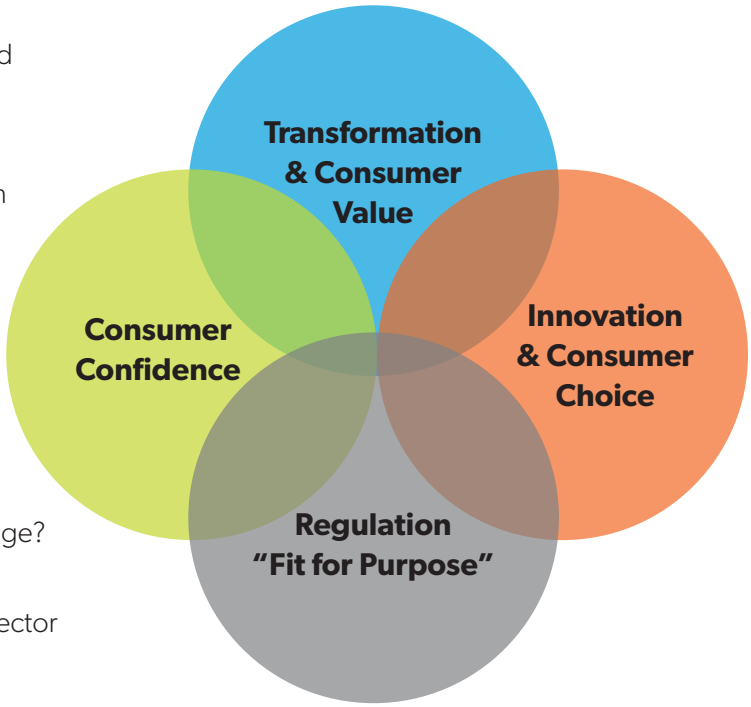
Introduction & Our Strategic Challenges

At the outset of the work to develop our new Strategic Blueprint, we posed the question: "Where do we want the OEB and the sector it regulates to be in five years?" As we formulated our answer to that question, we assessed developments in the energy sector and the ways in which other regulators were addressing those changes.

We ultimately concluded that, during a period that will be characterized by accelerating change and transformation, the OEB should maintain and sharpen its focus on efficiency, cost-effectiveness, innovation, value for consumers, and our own effectiveness as a regulator. In this regard, the fresh strategic direction combines the OEB's current approach to consumer-centric regulation with a stronger emphasis on the new and different challenges posed by sector transformation.

Our answer is organized around four interconnected Strategic Challenges:

- **Transformation & Consumer Value:** How can the OEB help ensure that the evolution of the sector brings a stronger focus on demonstrable value for consumers?
- **Innovation & Consumer Choice:** How can the OEB incent and enable innovation that enhances consumer choice and control?
- **Consumer Confidence:** How can the OEB strengthen and sustain the confidence of consumers during a period of accelerating change?
- **Regulation "Fit for Purpose":** How should the OEB equip itself to meet the challenges of sector transformation?



Four Interconnected Strategic Challenges

Our new Strategic Blueprint is designed to address these Strategic Challenges. In doing so, it builds on the important work that the OEB has already undertaken over the past five years, including:

- The implementation of a Renewed Regulatory Framework (RRF) that emphasizes the need for robust customer engagement, utility system planning that paces and prioritizes investment, and demonstrable improvements in utility performance, while allowing utilities to select a rate-setting method that suits their circumstances
- The redesign of electricity distribution rates to give residential customers a better signal regarding the cost and value of the delivery service they receive
- The adoption of a framework to govern the compliance by natural gas distributors with their requirements under the new provincial cap and trade regime
- The introduction of new ways to give consumers a better understanding of the work of the OEB and, in turn, to provide the OEB with deeper insight into the perspectives of energy consumers
- The implementation of measures to inform and empower consumers, including stronger rules regarding the conduct of energy retailers and a Consumer Charter setting out the rights and responsibilities of residential energy consumers
- Ongoing improvements to the OEB's own adjudicative and decision-making processes

These achievements provide a solid foundation for the significant work that lies ahead. Indeed, our new Strategic Blueprint reflects the continuation of the direction already reflected in these earlier initiatives.

Background & Environmental Scan

The formulation of our new Strategic Blueprint was informed by an assessment of key developments in the energy sector – both in Ontario and in other jurisdictions.

These developments include technological innovation, the emergence of new business models, changing consumer expectations, the trend towards utility consolidation, the market outlook underlying the new Long-Term Energy Plan, our own experience with the Renewed Regulatory Framework (RRF), and new public policy initiatives, particularly regarding carbon emissions and climate change.

Our observations and conclusions about key trends in the sector and about the implication of these trends for the OEB's strategic direction are set out below.

Our Observations About Trends in the Energy Sector:

Technological Innovation Is Accelerating, but the Pace of Deployment Is Uncertain

- The electricity sector is experiencing rapid innovation – both in information technologies that offer enhanced capabilities for managing networks and in distributed energy and storage resources that create new opportunities for on-site generation and micro grids
- Ontario already has considerable experience with advanced metering technologies and the systems to integrate intermittent resources
- New and expanded uses for electricity, including in the transportation sector, will place fresh demands on the power system
- Innovation in the electricity sector is paralleled by innovation in the natural gas sector, such as hydraulic fracking that has opened up new supply basins, the use of natural gas as a transportation fuel and the use of renewable natural gas as a source of supply
- While some of these new technologies support "traditional" utility functions and customer relationships, others may impact the utilization of existing infrastructure and challenge or "disrupt" existing business models
- The pace and pattern of deployment of these technologies will likely vary from jurisdiction to jurisdiction – it will be strongly influenced by the supply outlook, the cost of competing technologies, the way in which network services are priced, and the way in which network operators are remunerated

The Impacts of Climate Change Policies Will Be Significant & Complex

- Much of the technological innovation in the electricity and natural gas sectors has been driven by the growing focus on reducing carbon emissions
- Ontario is now committed to significant Greenhouse Gas (GHG) emission reductions over the next 30 years under the new Climate Change Action Plan (CCAP) and its centrepiece, the new cap-and-trade system
- Obligations under that system will fall most heavily on fossil fuel distributors, including the natural gas distributors we regulate

- However, over the longer term, the impact of the CCAP and the shift away from fossil fuels will be felt throughout the broader energy sector, including the electricity distributors and transmitters we regulate
- For instance, the accelerated deployment of distributed energy technologies, electric vehicles (EV) and electric-powered mass transit, together with increased investments in energy efficiency, will impact all aspects of utility operations and planning and will create new risks to be assessed and managed
- In addition, the advent of extreme weather events associated with climate change has increased focus on the resiliency of energy systems
- Although the pace of these developments is uncertain, the potential significance and complexity of their impact is clear – both we and the entities we regulate must be equipped to anticipate and address these trends

The Structure of the Sector Is Changing, but Will Remain Diverse

- The reports of both the *Distribution Sector Review Panel* (2012) and the *Premier's Advisory Panel on Government Assets* (2015) concluded that consolidation could facilitate efficiencies and cost savings for the electricity distribution sector and better equip distributors to address the changes underway in the energy sector
- In the past several years, we have seen the Hydro One IPO, the creation of a new mega-utility in the GTHA, and other mergers and acquisitions that have extended the footprint of a growing number of Local Distribution Companies (LDCs) outside and beyond the territory of their municipal owners
- However, other electricity LDCs and their municipal shareholders have made the decision not to sell or merge. As an alternative to formal consolidation, some distributors have formed alliances or associations to share services and resources
- Ontario is also seeing mergers and acquisitions activity in the natural gas distribution sector and the emergence of real rivalry for the expansion of gas distribution facilities to service new communities and territories
- The Ontario electricity distribution sector will likely continue to be characterized over the next five years by considerable diversity among LDCs as to size, density, geographic footprint and investment requirements

Ontario's Bulk Power System Is Well Positioned to Meet Future Needs but Faces Significant Change

- The IESO's 2016 *Ontario Planning Outlook*, prepared to support the new Long-Term Energy Plan, outlined a range of "low," "flat" and "high" provincial electricity demand outlooks for the next 20 years, largely reflecting different assumptions regarding the shift from fossil fuels and the level of electrification arising from the province's climate change policies
- The *Ontario Planning Outlook*, together with the accompanying *Technical Fuels Report*, highlighted the strong interrelationship between the electricity and natural gas sectors
- The *Ontario Planning Outlook* concluded by emphasizing the need to remain flexible, to understand the drivers of change and risk in the sector, and to address regulatory frameworks that may not meet the needs of an evolving sector – observations that are particularly pertinent to the OEB's own strategic planning

Understanding Consumer Expectations & Impacts Is Critical

- Large commercial and industrial customers have been engaged in managing their energy consumption for many years – incented in some cases by programs such as the recently expanded Industrial Conservation Initiative
- New technologies – including smart appliances, home energy systems, distributed generation, and small energy storage units – are bringing the same opportunities to smaller customers as well
- However, in Ontario, smaller consumers seem focused less on the promise of technology and much more on the "basics" of service and price
- Concern about the impact of electricity prices is reflected in the implementation of the Ontario Electricity Support Program and the recent Fair Hydro Plan that has reduced electricity bills for small volume and other qualifying consumers and keeps bill increases for such consumers to the rate of inflation over the next four years
- The concern about electricity prices is a reminder of the need for acute sensitivity regarding the economic impact on consumers of new infrastructure investment, including investments to support the deployment of new technologies

After Five Years, the Renewed Regulatory Framework Warrants a Relook

- The Renewed Regulatory Framework (RRF) was first introduced in late 2012 for electricity distributors and, since then, has been extended to natural gas distributors, Ontario Power Generation, and electricity transmitters
- Our expectation has been that the RRF would drive:
  - Stronger customer engagement by utilities
  - More robust system planning and regional planning
  - A stronger focus by utilities on long-term value for consumers
- To date, we have considered more than 275 applications under the RRF
- We are confident that we are achieving the first two objectives: we are seeing utilities engage more effectively with their customers and undertake more robust system planning
- But we are less confident that we are yet seeing the stronger focus on longer-term value for consumers that we had expected
- Regulators in other jurisdictions are considering new approaches to the remuneration of utilities, including ways of treating traditional capital investments versus non-capital expenditures, that might better encourage the adoption of innovative and least-cost solutions by utilities
- Given the changes underway in the sector, we should assess whether similar regulatory reforms are warranted in Ontario and how they might further enhance efficiency and innovation in the energy sector

The Work of Other Energy Regulators Is Instructive

- Other energy regulators are addressing the issue of how to use their regulatory powers to address sector evolution
- Some regulators are adopting a "proactive" approach and seeking to lead utilities to a particular model sanctioned by the regulator, while others are adopting a "wait-and-see" approach and reacting to the challenges of sector evolution as they arise
- Although no regulatory model has yet emerged as the preferred "industry standard," some of the key questions that other regulators are grappling with are instructive
- Those questions include the following:
  - How should utilities be remunerated in order to encourage them to be more efficient and to innovate?
  - Does sector transformation create new utility services that need to be assessed and remunerated appropriately?
  - How should utility rates and commodity prices be designed to provide appropriate signals to consumers to guide their own consumption and investment decisions?
  - How can regulators identify and address regulatory barriers to innovation and new business models that benefit consumers?
  - What measures are needed to protect consumers or particular subsets of consumers from some of the impacts of sector transformation (such as cost shifting, the protection of privacy, and concerns about sales practices regarding new products and services)?
  - What role should incumbent utilities play in the emerging market for distributed energy resources and related services?
  - How should the risk regarding underutilized or stranded assets be allocated between utilities and their customers, and are there any steps that can or should be taken to mitigate that risk?

Our Conclusions About the Implications of These Trends for Our Strategic Direction:

Our consideration of these key trends and developments has helped to shape the approach we propose to adopt regarding sector evolution. In particular, we noted and concluded as follows:

- The ways in which other utility regulators are addressing sector evolution reflect the particular institutional arrangements, market structure and broader policy framework prevailing in their jurisdictions – similarly, the OEB's own approach must be grounded in an appreciation of the circumstances in Ontario and of its own mandate
- Our approach should focus on how we can best address sector evolution through the use of our existing regulatory powers and tools, including rate making, infrastructure approvals, licensing, codes and rules, and the issuance of policy guidance
- It is premature to sanction or mandate, as some regulators have, a particular new business model for utilities or a specific new "platform" to accelerate the deployment of distributed resources – picking a particular model or platform at this point would impede innovation
- However, the complexity of the changes afoot in the Ontario energy sector suggest that a "wait-and-see" approach is not sufficient for Ontario – it would simply prolong uncertainty for both incumbents and new service providers
- The OEB has the opportunity – and the responsibility – to *support* and *guide* the sector it regulates through the evolution underway:
  - *Support* – by helping prepare utilities, other market participants and consumers for the change that lies ahead
  - *Guide* – by working to secure the benefits and mitigate any adverse consequences of that change and uncertainty

Our Vision, Mission & Values

The OEB has regulated the natural gas sector since 1960 and the electricity sector since 1999. Our objectives, responsibilities and powers are set out in legislation, regulation and directives.

For industry, we:

- Set the rates and prices that electricity and natural gas utilities can charge
- Monitor the financial and operational performance of utilities
- Approve major new electricity transmission lines and natural gas pipelines that serve the public interest
- Approve qualifying mergers, acquisitions and dispositions by electricity and natural gas transmitters and distributors
- Set the payments to be received by Ontario Power Generation in respect of its regulated nuclear and hydroelectric generation facilities
- Establish and enforce codes and rules to govern the conduct of utilities and other industry participants

For consumers, we:

- Protect their interests with respect to the rates and performance of their utilities
- Provide them with the information they need to better understand their rights and responsibilities
- Protect their interests in retail electricity and natural gas markets
- Address the particular needs of low-income consumers, especially in the context of utility customer service rules

In addition, we play an important role as an independent and expert advisor to government regarding energy policy matters.

These broad responsibilities and powers, together with the observations and conclusions from the environmental scan, underlie our Vision and Mission for the next five years.

Our Vision answers the question with which we started – *"Where do we want the OEB and the sector it regulates to be in five years?"*

Our Mission sets out how we aim to achieve our Vision.

Our Values express our commitment about how we will conduct ourselves both within our own organization and in our engagement with others.

In this way, our Vision, Mission and Values complement our statutory objectives and other enduring regulatory principles.

Vision

The OEB supports and guides the continuing evolution of the Ontario energy sector by promoting outcomes and innovation that deliver value for all Ontario energy consumers.

Mission

We will pursue this Vision by:

- Strengthening the focus on demonstrable consumer value during a period of sector evolution
- Incenting and enabling innovation in a way that enhances consumer choice, control and value
- Strengthening and sustaining the confidence of consumers during a period of accelerating change
- Equipping our own organization to meet the challenges presented by sector evolution

Values

Effective: We hold ourselves to a high standard regarding the quality and efficiency of our work.

Independent: We are objective and bring an open mind to all we do.

Engaged: We learn from our dialogue with consumers, utilities and other industry participants.

Expert: We are experts in our field and share our knowledge with others.

Forward-looking: We support innovative solutions both within our own organization and by those we regulate.

Respectful: We serve the public interest and treat everyone with respect.

Our Strategic Goals & Objectives: 2017-2022

Our Strategic Goals and Objectives for 2017-2022 reflect our assessment of the key issues emerging from the environmental scan. They address the four Strategic Challenges, namely: Sector Transformation & Consumer Value, Innovation & Consumer Choice, Consumer Confidence, and Regulation "Fit for Purpose."

We have set out a Strategic Goal and a number of Strategic Objectives for each of the four Strategic Challenges. The Strategic Goals represent the specific outcomes we aim to achieve with respect to each of the corresponding Strategic Challenges. The Strategic Objectives describe the particular areas on which we will focus in order to attain each of the Strategic Goals. Each are summarized in the table below.

Strategic Challenges	Transformation & Consumer Value	Innovation & Consumer Choice	Consumer Confidence	Regulation "Fit for Purpose"
Strategic Goals	• Utilities are delivering value to consumers in a changing environment	• Utilities and other market participants are embracing innovation in their operations and the products they offer consumers	• Consumers have confidence in the oversight of the sector and in their ability to make choices about products and services	• The OEB has the resources and processes appropriate for the changing environment
Strategic Objectives	• The regulatory framework incents utilities to focus on long-term value for money and least-cost solutions • Regional and utility system planning reflect the continuing evolution of the sector • Utility infrastructure is optimized during the shift to a low carbon economy	• The regulatory framework incents and enables utilities to adopt innovative solutions • The design of network rates and commodity prices support the efficient use of infrastructure and enable greater customer choice and control • Our codes and rules reflect the needs of an evolving sector	• Consumers understand their rights and choices • Consumers are treated fairly by utilities and other service providers • Consumer perspectives are welcomed, respected and addressed in all regulatory processes • The benefits of innovation and sector transformation are realized by all types of consumers	• We have the expertise needed to address sector evolution • Our own organization and processes remain flexible and are adapted to changing needs • Our work is supported by effective engagement and collaboration

Strategic Objectives:

1 Utilities are delivering value to consumers in a changing environment:

- The regulatory framework incents utilities to focus on long-term value for money and least-cost solutions
- Regional and utility system planning reflect the continuing evolution of the sector
- Utility infrastructure is optimized during the shift to a low carbon economy

A focus on consumer value lies at the very centre of the OEB's approach to utility regulation. Given the broad changes underway in the sector, the OEB has both the need and opportunity to sharpen that focus – particularly with respect to network investments associated with sector transformation. On the one hand, "smart grid" and distributed technologies, together with conservation initiatives, present utilities with opportunities to serve customers in ways that may be less expensive and more flexible than traditional infrastructure investment. On the other hand, the anticipated trend towards a low carbon economy may affect the way in which both natural gas and electricity networks are used. That trend, together with measures to increase the resilience of energy infrastructure, may call for new investment in networks or the redeployment of infrastructure. The OEB's regulatory framework should encourage utilities to undertake such investments and expenditures in a co-ordinated and cost-effective manner.

The ways in which the OEB aims to achieve this Goal include:

- Maintaining a high level of understanding of the changes underway in the sector and their implications for the investment needs, operations and financial position of regulated entities
- Remunerating utilities in ways that strengthen their focus on long-term value and least-cost solutions
- Supporting regional planning and cost-sharing arrangements among utilities, particularly electricity distributors, that offer long-term value for consumers
- Requiring utilities to reflect the impact of sector evolution, including cyber security, system resilience, and opportunities to "right size" their networks, in their system planning and operations
- Monitoring the impact of sector evolution on the utilization of natural gas and electricity networks and assessing any operational and financial impacts and risks

2 Utilities and other market participants are embracing innovation in their operations and the products they offer consumers:

- The regulatory framework incents and enables utilities to adopt innovative solutions
- The design of network rates and commodity prices support the efficient use of infrastructure and enable greater customer choice and control
- Our codes and rules reflect the needs of an evolving sector

This goal is strongly connected to the prior one. The way the OEB remunerates utilities can influence the degree of innovation achieved by utilities in their operations and services arrangements with consumers. As noted in the *Ontario Planning Outlook*, the adoption of innovative solutions can also be affected by the rules and requirements that govern utilities and other market participants.

The OEB has already taken a number steps to accommodate and support innovative solutions. Those initiatives include the creation of a new licence to meet the needs of energy storage facilities, the transition towards a new design for electricity distribution rates for residential customers that will ensure that distributors can facilitate the adoption of new technologies, such as net metering, by such customers, the issuance of guidance regarding the regulatory status of EV charging stations, and the proposed adoption of a new approach to the funding of the "optimal" distribution and transmission investments identified through the regional planning process. Despite these diverse initiatives, the broad changes underway in the sector suggest that a more comprehensive review and "modernization" of the OEB's codes, rules, guidelines and approach to utility remuneration is warranted.

From a consumer perspective, the structure of network rates and commodity prices will influence decisions about consumption and investment. Indeed, the design of such rates and prices is a key factor influencing the deployment of distributed resources and the way in which networks are used. Changes in the way consumers and other market participants use networks may yield new services and "value streams" that will need to be assessed and priced appropriately. With respect to commodity rates, the OEB's *RPP Roadmap* has already set out the OEB's phased approach to providing consumers greater choice and control under the Regulated Price Plan.

The ways in which the OEB aims to achieve this Goal include:

- Remunerating utilities in ways that encourage utilities to pursue cost-effective innovation in their operations and services
- Modernizing the OEB's rules, codes and other regulatory instruments to reflect the needs of an evolving sector
- Addressing any unwarranted regulatory barriers to innovation and new business models that benefit consumers
- Continuing the redesign of electricity distribution rates to give all customers a better signal regarding the cost of delivery service
- Continuing the implementation of improvements to the structure of RPP rates in accordance with the *RPP Roadmap*
- Working with LDCs and other agencies and market participants to identify and understand emerging new energy-related "value streams" and service models

3 Consumers have confidence in the oversight of the sector and in their ability to make choices about products and services:

- Consumers understand their rights and choices
- Consumers are treated fairly by utilities and other service providers
- Consumer perspectives are welcomed, respected and addressed in all regulatory processes
- The benefits of innovation and sector transformation are realized by all types of consumers

Over the past five years, the OEB has used a number of approaches designed to give consumers a better understanding of the work of the OEB and, in turn, to provide the OEB with deeper insight into the perspectives of energy consumers. We will need to redouble those efforts during a period of change and uncertainty in Ontario's energy sector. Consumers will need confidence that their utilities, service providers and the broader sector are evolving in a way that respects and reflects their interests, particularly regarding price and service. For this reason, the participation of consumers in adjudicative proceedings, particularly those regarding utility rates, has become increasingly important. They will need to understand the new products and services that may become available and be assured that the providers of such products or services will treat them fairly. Moreover, during the process of market evolution, utilities and other market participants should be encouraged – and expected – to look for innovative ways of serving diverse consumer groups, including low-income consumers and remote indigenous communities.

The ways in which the OEB aims to achieve this Goal include:

- Helping consumers understand the changes underway in the sector, particularly regarding any new service options they may have
- Continuing the reform of our adjudicative and other decision-making processes to enhance opportunities for consumer participation and to ensure consumer perspectives are considered and addressed
- Working with LDCs to pilot and test consumer reaction to new services and pricing models
- Modernizing utility customer service rules in a way that meets the reasonable expectations of consumers
- Encouraging utilities and other industry participants to develop innovative approaches to the needs of low-income and indigenous communities
- Continuing our strong focus on compliance by regulated entities, including utilities and retail suppliers, and addressing any fresh challenges associated the development of new products and services

4 The OEB has resources and processes appropriate for the changing environment:

- We have the expertise needed to address the evolution of the sector
- Our own organization and processes remain flexible and are adapted to changing needs
- Our work is supported by effective engagement and collaboration

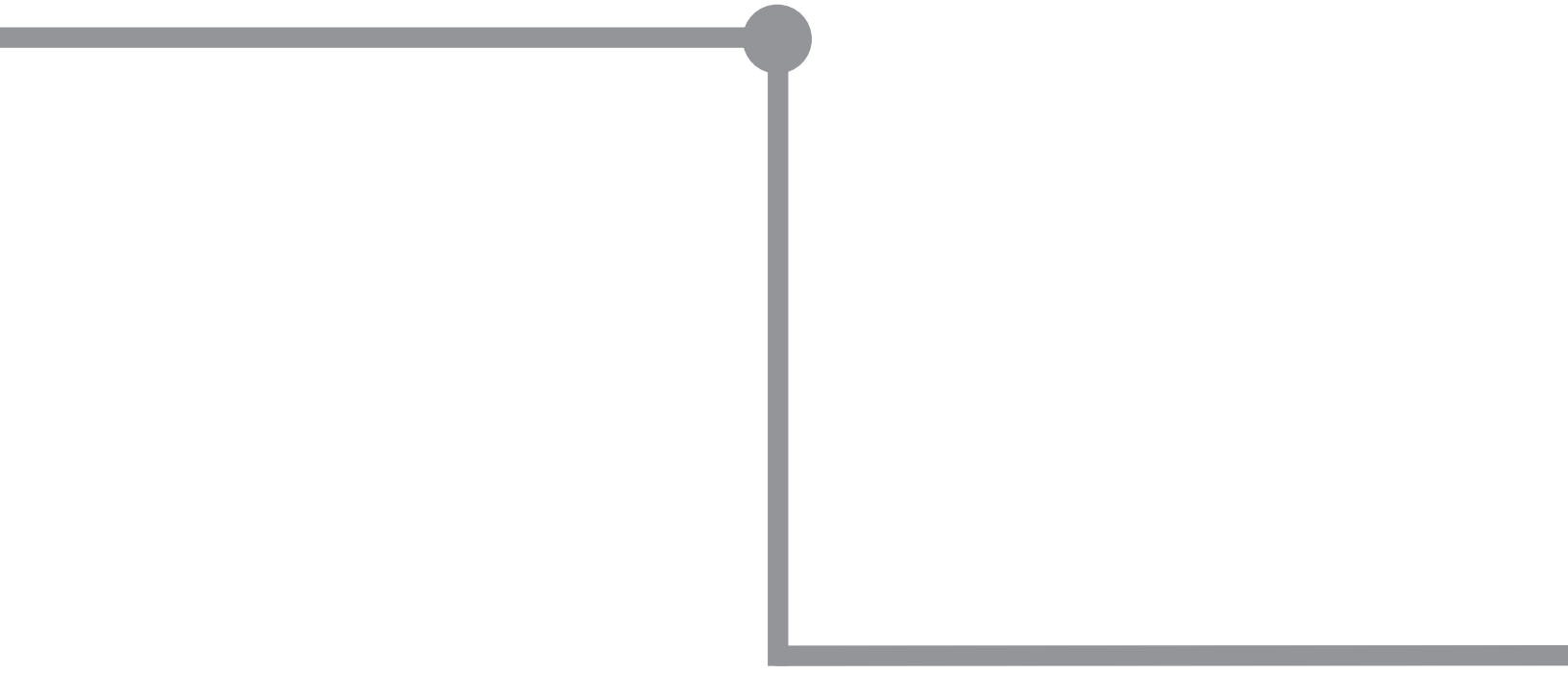
The success of our new strategy will depend very much on the commitment and engagement of those who work at the OEB. Our employees and Board Members are known for their expertise, professionalism and commitment to public service. These qualities will serve us well as the OEB adapts its organization and processes to the needs of an evolving sector. Given the uncertainties that lie ahead, maintaining flexibility in both our organization and processes will be critical. Engagement and collaboration will also be important. As we seek to understand and address the changes underway in the sector, we will need to listen to consumers and our stakeholders and to work closely with the government and other agencies.

The ways in which the OEB aims to achieve this Goal include:

- Promoting a workplace culture that values expertise, professionalism, flexibility, and innovation
- Providing opportunities for staff to enhance their understanding of the changes underway in the sector
- Building our "bench-strength" in areas such as empirical analysis, utility finance and system modeling
- Ensuring we have access to "best-in-class" expertise as needed
- Continuing our dialogue with other utility regulators, particularly through similar bodies beyond our provincial and national borders
- Improving our decision-making and other processes by deploying our resources towards major proceedings and adopting simpler and more "proportionate" reviews as appropriate
- Engaging with regulated entities and other stakeholders through a broad range of consultation processes and techniques
- Continuing to serve as an expert and independent advisor to government on energy policy issues

Looking Forward

Our Strategic Blueprint sets ambitious goals for both the OEB and the sector we regulate. It was born of our recognition that changes underway in the sector required us to rethink our approach to regulation and the way we carry out our statutory responsibilities. The preparation of this Strategic Blueprint was the easiest part. We now face the hard work of reflecting our fresh strategic vision in our business and operating plans and, ultimately, in our decision making and in the guidance we provide to the sector. Everyone at the OEB recognizes that doing this work well will demand continued and constructive engagement with consumers, regulated entities and all our stakeholders.



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